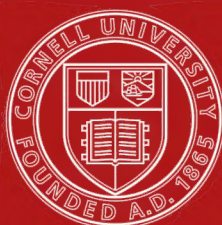


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THE
PROCEDURE AND LAW
OF
SURROGATES' COURTS

OF THE
STATE OF NEW YORK

TWO VOLUMES

BY
WILLIS E. HEATON
FORMER SURROGATE OF RENSSELAER COUNTY

FOURTH EDITION

Revised to conform to Surrogates' Court Act, Civil Practice Act, Decedents'
Estate Law and all other amendments

VOLUME ONE

* * * * * "the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances."

TENNYSON



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INTRODUCTION TO THE FOURTH EDITION

The radical changes brought about by the Civil Practice Acts of 1920 and 1921 have made a new edition of this work necessary. The transposition of the sections of the Code of Civil Procedure relating to practice in Surrogate's Court to the Surrogate's Court Act, the Civil Practice Act, the Decedent Estate Law and many other laws, will for some time cause confusion to all lawyers in finding and citing the law. The author has tried to relieve this as much as possible by giving the old and new reference after each section quoted, and also by furnishing a "Transposition Table" from which the new location can be easily found.

Where a section is referred to in the text, the reference is to a section of the Surrogate's Court Act unless otherwise mentioned.

When the Third Edition was printed in 1914 the work of the Committee on Revision of the Surrogate's Practice had not been subjected to the scrutiny of the courts, but during the intervening seven years the revised sections have been before the courts and the decisions there made have been inserted in this edition. The construction of these sections seems to be pretty well settled, and there has been very little change of substance in re-enacting them into the Surrogate's Court Act, so that, fortunately for the profession, the change of place will not necessitate uncertainty as to construction and meaning.

As the author has said in his previous editions, it has been his aim to make a book of practical value to the busy lawyer; a book written from the author's own experience as a practitioner and surrogate. It has been very gratifying to the author to hear from judges, surrogates and lawyers that they have found his work useful in the past, and it is his hope that this new edition will be even more helpful.

WILLIS E. HEATON.

TROY, N. Y., *October 1, 1921.*

INTRODUCTION TO THE RE-WRITTEN EDITION.

This third edition is entirely revised and largely re-written to conform to the recent revision of the surrogate's practice. The author was greatly interested in a general revision of the practice along the lines of greater simplicity and economy, and was the first chairman of the revision commission, appointed by the Legislature, and was thereafter the special counsel of the commission, and consequently was intrusted with the principal part of the work of revision and of formulating new practice.

The explanation of the changes made in the former sections of the Code of Civil Procedure, given throughout the book under the head of "Effect of Revision," must not be taken as expressing the views of the revision commission as a body, for the members might disagree with the statements so made, but as giving the ideas of the author with reference thereto.

It is apparent that very little of case law can be cited under the new sections, but the former decisions have been in many instances inserted because they afford an explanation of the section, which is applicable, and which will greatly assist the practitioner. In many instances the new matter in a section will be found to be in accordance with a construction of the former section and therefore the cases cited are applicable.

The author does not presume to think that this book contains all the law and practice upon every case that may arise in Surrogate's Court, but he does hope that it will continue to be, as the former editions have been, a guide and instructor to the members of the profession who practice in Surrogate's Court.

WILLIS E. HEATON.

TROY, N. Y., AUGUST 22, 1914.

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INTRODUCTION TO REVISED REPRINT.

Since this book was first printed, there have been two sessions of the Legislature, in the latter of which the Consolidated Laws were enacted. Numerous amendments to the law have been made by special acts, but the General Consolidated Laws did not change the law or practice applicable to Surrogates' Courts in any particular. The latter act, however, did transfer many sections of various laws from one title to another, so that a change in reference is necessary. Such changes have been made wherever the section has been quoted, but not in the body of the text. A convenient table showing the old and the new location will be found in volume one.

There has been no intention of revising the work, except so far as necessary to bring it down to date, with such corrections and additions that it may continue to merit the appreciation which the bar has so generously given it.

WILLIS E. HEATON.

TROY, N. Y., JULY 1, 1909.

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INTRODUCTION.

When I took up the duties of surrogate of Rensselaer county January 1, 1902, I began the practice of making a thorough examination of all questions of law and procedure as each was raised in proceedings before me.

It was soon apparent that I was being called upon to examine the same subject, or different phases of the same subject, again and again. I then began to preserve memoranda of the cases examined, which I classified for convenient reference. In such manner has this book been the outgrowth of the practical work of transacting the large amount of business which comes to the Surrogate's Court of Rensselaer county, and it is hoped that it will be as useful to the practitioner as the material in it has been to me.

The citations from the cases have been used quite generally in their detached form, with the result that the text may have lost smoothness; but that is better than that the busy lawyer should lose time.

Most of the text consists of literal extracts from opinions themselves which have been gathered by a careful examination of every volume of the Court of Appeals' reports and many others, and then put together as the body of the work. Where a reported case states the principle of law, or outlines the procedure, it has been used without comment, and thereby brevity and exactness have been gained.

Many cases are followed in the citations from the lower to the highest court so that the history of the case may be known and all the opinions consulted without loss of time.

The procedure in the settlement of an estate is of the nature to admit of an orderly and logical treatment. The plan of this

work adopts such treatment with one subject following another in the order in which each arises or may arise, so that it is but necessary to turn the pages of the book to take one from the first step to the last in the settlement of an estate. It explains what ought to be done next in court and out of court, and how to do it. This method prevents the complete discussion of a subject in all its bearings under one head, but its different phases will be found in their appropriate places with reference to the particular proceeding desired. It is believed that the use of the book will demonstrate the advantage of this plan.

This work is not intended to be so much a general exposition of the principles of the law and procedure applicable to Surrogates' Courts as it is a brief upon each subject ready for instant use by the busy practitioner.

Hoping that all who have occasion to use this book may find it a guide and helper in the important and interesting work arising in Surrogate's Court, I give the result of my labor to the profession.

WILLIS E. HEATON.

HOOSICK FALLS, N. Y., AUGUST 31, 1907.

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- ¶ 470. § 229. Payment of money into court.
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- ¶ 474. § 269. Retention of fund or property.
- ¶ 475. Payment under decree during running of time to appeal.
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CHAPTER LIX. DEFINITIONS OF EXPRESSIONS AND TERMS USED IN RELATION TO EXECUTORS, ADMINISTRATORS, GUARDIANS AND TESTAMENTARY TRUSTEES; APPLICATION OF SURROGATE'S COURT ACT AND ITS EFFECT; CERTAIN WORDS AND PHRASES CONSTRUED BY THE COURTS.

- ¶ 476. § 314. Definition of expressions used in Surrogate's Court Act.
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- § 316. Provisions of Civil Practice Act made applicable.
- § 317. Effect of chapter on laws applicable to certain counties.
- ¶ 477. Certain words and phrases construed by the courts.

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2762	301	170	2770	316	476
2763	309	171	2771	317	476
2764	310	171	3311	30	11
2765	311	316	3317	287	134
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THE PROCEDURE AND LAW

OF

SURROGATES' COURTS

CHAPTER I.

The Surrogate, his personal qualifications, disqualifications and duties.

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¶ 1 The Surrogate is a Judge of a Court of Record; Origin of the Title; General Powers.

The surrogate is a judge of a court of record, and as such has all the general powers of a judge of a court of record, except as those powers are limited by special provision of law.

Mr. Surrogate Fowler has written *In re Spingarn*, 96 Misc. Rep. 141, 159 N. Y. Supp. 605, as follows:

"The surrogate is a judge of a court of record and his office is now protected by the Constitution. Article 6, § 15, State Constitution, recognizes the existence of the court and perpetuates the surrogates. The Surrogate's Court is a court of record (Judiciary Law, art. 2, § 2), and the surrogate is classed among the judges of the state (General Construction Law, § 26). Under the present Constitution the Legislature can no longer enact any law abolishing the surrogate's office. * * * In *Garlock v. Vandervort*, for example (128 N. Y. 374, 378), the court expressly stated that the surrogate was a judicial officer. It would be strange were it otherwise, as under the existing law many of the judicial duties, formerly exercised by the chancellor of this State and the justices of the Supreme Court of the State, are now transferred to surrogates. The surrogates of this State, indeed, have a far more extended jurisdiction than the judges of the Probate Division of the High Court of England, and the Surrogates' Courts are recognized as of the first importance. To hold that the surrogate's is not a purely judicial office would be illogical and antithetic. There is nothing contained in *Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, which derogates from the accuracy of the affirmation that the surrogate is a judge."

A surrogate has no general equitable jurisdiction and, for the matter of that, no general legal jurisdiction. But in so far as it is necessary to discharge the duties and functions conferred upon him by statute and to make proper orders and decrees in matters of which he has jurisdiction, he has all powers, legal or equitable, necessary to accomplish that result. *Matter of Verplanck*, 91 N. Y. 439.

While the tendency of recent legislation has been in the direction of enlarging the powers of the surrogate, he has not yet been given the broad powers of a court of equity. *Matter of Randall*, 152 N. Y. 508; *Matter of Walker*, 136 id. 20; *Sanders v. Soutter*, 126 id. 193; *Matter of Wagner*, 119 id. 28; *Bevan v. Cooper*, 72 id. 317; *Stilwell v. Carpenter*, 59 id. 414; *S. C.*, 62 id. 639; 2 Abb. N. C. 238; *Matter of Bunting*, 98 App.

Div. 122; app. dismiss., 182 N. Y. 552; *Matter of Schaefer*, 65 App. Div. 378, 73 N. Y. Supp. 57; aff'd, 171 N. Y. 686; *Matter of Kellogg*, 39 Hun, 275; aff'd, 104 N. Y. 648.

Origin of title.

A surrogate, meaning literally a substitute, or one who acts for another, from the earliest times has been an officer of limited jurisdiction. Originally in England he was the bishop's chancellor, and presided for him in the diocesan court. In colonial times he was the delegate or substitute of the Governor, and acting for him admitted wills to probate. Shortly after the Revolution statutes were passed which cautiously extended his powers by bringing other subjects within his jurisdiction. 2 Laws of New York (Jones & Varick's edition), 71; 1 Greenleaf's Laws, 238; 3 id. 391; L. 1799, p. 724; 1 Webster's Laws, pp. 317, 325; 3 id. 158, 316; 5 id. 138; L. 1813, p. 139; L. 1819, p. 215; L. 1823, p. 62. The Revised Statutes defined and to some extent enlarged his powers, but care was taken to prevent him, "under pretense of incidental powers or constructive authority," from exercising "any jurisdiction whatever not expressly given by some statute of the State." 2 R. S. 220, § 1; *Matter of Brick's Estate*, 15 Abb. Pr. 12, 15. In 1837 this severe restriction was repealed, and it was held that the effect was to restore the incidental powers possessed by Surrogates' Courts previous to the Revised Statutes. *Sipperly v. Baucus*, 24 N. Y. 46. By the Judiciary Act of 1847 and by various other statutes, changes were made and defects corrected, but still the jurisdiction of the surrogate was not advanced to any remarkable degree, although his court was finally made a court of record. New subjects were added to his jurisdiction but general powers were carefully withheld from him. Even the codification which went into effect on the 1st of September, 1880, left the powers of Surrogates' Courts substantially where it found them. The codification, as amended from time to time, still governs the subject and is now found in the Sur-

rogate Court Act. The general jurisdiction of the surrogate and his court appears in section 40 of that act, by which, among other things, he is authorized

“To administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily appears in such proceeding, or is brought in by supplemental citation, as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.”

By section 20 certain incidental powers relating to procedure are conferred upon the surrogate. With respect to any matter not expressly provided for in that section he is authorized thereby to proceed in all matters subject to the cognizance of his court, according to the course and practice of a court having by the common law jurisdiction of such matters except as otherwise prescribed by statute, and to exercise such incidental powers as are necessary to carry into effect powers expressly conferred. *Matter of Thompson*, 184 N. Y. 36.

¶ 2 The Surrogate, His Title, Seal, and Personal Disabilities and Liabilities.

Surrogate and acting surrogate; their official designations.

Where the county judge is also surrogate, he may be designated, in any paper or proceeding relating to the office of surrogate, as the surrogate of the county, without any addition referring to his office as county judge. A local officer elected, as prescribed in the constitution, to discharge the duties of surrogate, or of county judge and surrogate, is designated in this act, and, when acting as surrogate, may be designated as the “special surrogate” of his county. Where an officer, other than the surrogate, or special surrogate, acts as surrogate in a case prescribed by law, he must be designated by his official title with the addition of the words, “and acting surrogate.”

§ 2, *Sur. Ct. A.* Former § 2472, *Code Civ. Pro.*

Seal of the surrogate and surrogate's court.

The seal of the surrogate of each county shall continue to be the seal of the surrogate's court of that county, and must be used as such by an officer who

discharges the duties of the surrogate. A description of each of such seals must be deposited and recorded in the office of the secretary of state, unless it has already been done; and must remain of record.

§ 3, *Sur. Ct. A.* Former § 2473, *Code Civ. Pro.*

Surrogate, when not to be counsel.

A surrogate shall not be counsel, solicitor or attorney in a civil action or special proceeding for or against any executor, administrator, temporary administrator, testamentary trustee, guardian or infant, over whom, or whose estate or accounts, he could have any jurisdiction by law.

§ 4, *Sur. Ct. A.* Former § 2474, *Code Civ. Pro.*

A judge shall not act as attorney or counselor in any action or special proceeding, which has been before him in his official character.

§ 18, *Judiciary Law.*

No surrogate in a county having a population exceeding one hundred and twenty thousand shall practice as an attorney or counselor in any court of record in this state or act as referee.

§ 20, *N. Y. State Const., art. VI.*

A surrogate has no right to become counsel for an administrator appointed by him in an action in another court, and the sum paid for such services will not be allowed on the administrator's accounting. *Merrill v. Parsons*, 166 App. Div. 972, 151 N. Y. Supp. 794, aff'd, 223 N. Y. 667.

Judge's partner or clerk not to practice before him.

The law partner or clerk of a judge shall not practice before him, as attorney or counselor in any cause, or be employed in any cause which originated before him.

From § 471, Judiciary Law.

Employee of surrogate's office.

The clerk or deputy clerk or other person employed in any capacity in a surrogate's office shall not act as appraiser, as attorney or counsel or as referee, or special guardian in any matter before the surrogate.

Part of § 32, Sur. Ct. A. Part of former § 2502, Code Civ. Pro.

Surrogate liable for clerk's acts.

A surrogate hereafter elected or appointed, and the sureties on his official bond, are liable for any act of the clerk or deputy clerk of the surrogate's court in the discharge of his official duties, during the surrogate's term of office, as if the act were performed by the surrogate. The surrogate may take security from the clerk or deputy clerk, or either of them, to indemnify him against the liability created by this section.

§ 5, *Sur. Ct. A.* Former § 2475, *Code Civ. Pro.*

¶ 3 Surrogate, When Disqualified to Act.

Surrogate, when disqualified.

In addition to his general disqualifications as a judicial officer, a surrogate is disqualified from acting upon an application for probate of a will, where he is a subscribing witness, or is necessarily examined or to be examined as a witness.

A surrogate is also disqualified in any matter in his court where he files a certificate that his relations to the parties or the subject matter are such that it is improper for him to act.

§ 6, *Sur. Ct. A.* Former § 2476, *Code Civ. Pro.*

Whether or not the surrogate shall file a certificate of disqualification under this section is discretionary with him, and no party can compel him to file it. *Matter of Carter*, 193 App. Div. 356, 184 N. Y. Supp. 40.

When the surrogate as a judge of a court of record is disqualified; degree, how computed.

A judge shall not sit as such in, or take any part in the decision of, a cause or matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity, or affinity to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor.

From § 15, *Judiciary Law.*

When he is actually disqualified under section 15 of the Judiciary Law, no certificate is necessary. In order to have the record complete a certificate is often made and filed.

Must be related to a party.

A surrogate is not disqualified where his wife is a legatee, if she is not made a party to the probate. *Hopkins v. Lane*, 6 Dem. 12, 3 N. Y. Supp. 661, 19 N. Y. St. Repr. 528.

Officer of a corporation legatee.

A surrogate who is an officer of a church which is a legatee is not disqualified. *Hopkins v. Lane*, 6 Dem. 12, 3 N. Y. Supp. 661, 19 N. Y. St. Repr. 528.

Relationship to special guardian.

A special guardian is not a "party" and the appearance of a brother of the surrogate as the special guardian does not disqualify the surrogate. *Matter of Van Wagonen*, 69 Hun, 365, 23 N. Y. Supp. 636, 52 N. Y. St. Repr. 699.

Interest as a public officer.

A surrogate who may have received funds of the estate as a public custodian is not thereby disqualified from exercising jurisdiction in that proceeding. *Matter of Hancock*, 91 N. Y. 284, revg. 27 Hun, 78.

Where he has been attorney.

A surrogate should not act in the settlement of the accounts of an executor where the account contains credits for payments made to the surrogate for services as an attorney rendered before he became surrogate, even though such credits are not objected to. *Wigand v. Dejonge*, 8 Abb. N. C. 260.

Disqualification; when objection must be taken.

An objection to the power of a surrogate to act, based upon a disqualification, is waived by an adult party to a special proceeding unless it is taken at or before the joinder of issue by that party, or, where an issue is not framed, at or before the submission of the matter or question to the surrogate.

§ 7, *Sur. Ct. A.* Former § 2477, *Code Civ. Pro.*

¶ 4 Vacancy in Office of Surrogate; How Filled; Effect of on Pending Proceedings.**Vacancy or disability; who to act as surrogate.**

Where in any county except New York, the office of surrogate is vacant; or the surrogate is disabled by reason of sickness, absence or lunacy, or is disqualified in a particular matter, and special provision is not made by law for the discharge of the duties of his office in that contingency; the duties of his office must be discharged, until the vacancy is filled or the disability ceases, as follows:

1. By the special surrogate.
2. If there is no special surrogate, or he is in like manner disabled, or is precluded or disqualified, by the special county judge.
3. If there is no special county judge, or he is in like manner disabled, or is precluded or disqualified, by the county judge.

4. If there is no county judge, or he is in like manner disabled, or is precluded or disqualified, by the district attorney.

But before an officer is entitled to act as prescribed in this section, proof of his authority to act as prescribed in section 11 of this act must be made. In any proceeding in the surrogate's court of the county of Kings, before either of the officers authorized in this section to discharge the duties of the office of surrogate of such county for the time being, if an issue is joined or a contest arises either on the facts or the law, such officer, in his discretion, may, by order, transfer such cases to the supreme court to be heard and decided at a special term thereof, held in such county, which order shall be recorded in the surrogate's office. A certified copy of such order, together with the appropriate certificate or certificates of the authority of the officer to act as surrogate, shall be sufficient and conclusive evidence of the jurisdiction and authority of the supreme court in such matter or cause. After a final order or decree is made in the matter or cause so transferred to the supreme court, the court shall direct the papers to be returned and filed, and transcripts of all orders and decrees made therein to be recorded in the surrogate's office of such county; and when so filed and recorded, they shall have the same effect as if they were filed and recorded in a case pending in the surrogate's court of such county.

§ 8, *Sur. Ct. A.* Former § 2478, *Code Civ. Pro.*

An earlier section (2484 Code Civ. Pro.) under which a district attorney acted in case of disqualification of the surrogate and the officers prior mentioned, was held to be constitutional in *People ex rel Oakley v. Petty*, 32 Hun, 443.

The right of the board of supervisors to designate a person to act (§ 14) is superior to the rights under this section, as these officers mentioned act only when "special provision is not made by law for the discharge of the duties."

Where "special provision" is made but not availed of, it has been assumed that the officers designated in section 8 might act.

Manner of filling temporarily a vacancy in the office of surrogate.

Sections 8 to 15, inclusive, of the Surrogates' Court Act designate who shall act as surrogate in case of a vacancy or disability, and they provide for an application to a justice of the Supreme Court for an order designating the proper officer to act, or in certain cases they provide for an application to the board of supervisors of the county for the appointment

of some other suitable person to act during the temporary disability.

Under a former section (2505 Code Civ. Pro.) it was held that a person might be designated to perform the duties of the surrogate who was absent from his office, even though the surrogate was within the State and his whereabouts were known. *Matter of Frye*, 48 N. Y. St. Repr. 572, 20 N. Y. Supp. 588.

No application to a Supreme Court justice is necessary, however, where the surrogate is disqualified in a particular matter, or where he is temporarily absent. His own certificate is sufficient in such a case. If the surrogate is temporarily absent and has not made the necessary certificate, the clerk of the Surrogate's Court or the county clerk may make it. Where the office is vacant, or the surrogate is mentally incapacitated, or in such physical condition that his absence will be more than temporary, an application to a Supreme Court justice should be made for an order determining that such a condition exists, and granting the proper officer power to act as surrogate. See § 11.

If surrogate disqualified who to act.

Where the surrogate of any county, except New York, is precluded or disqualified from acting with respect to any particular matter, his powers with respect to that matter, or if he be temporarily absent, his powers with respect to all matters, shall be discharged by the several officers designated in the last section, in the order therein provided. If there is no such officer qualified to act therein, the surrogate may file in his office a certificate, stating that fact; specifying the reason why he is disqualified or precluded; and designating the surrogate of any county, other than New York, to act in his place in the particular matter or during his absence. The surrogate so designated has, with respect to that matter, or generally when the designation is made on account of absence of the surrogate, all the powers of the surrogate making the designation, and may exercise the same in either county.

§ 9, *Sur. Ct. A.* Former § 2479, *Code Civ. Pro.*

This section and others following are intended to enable the surrogate, where he is disqualified in a particular matter or is to be absent, to make a certificate of the fact, and thus obviate application to the Supreme Court.

When supreme court may exercise powers in New York county.

In the county of New York the supreme court, at a special term thereof, on the presentation of proof of its authority, as prescribed in the next section, must exercise all the powers and jurisdiction of the surrogate's court, as follows:

1. Where the surrogate is precluded or disqualified from acting with respect to a particular matter, it must exercise all the powers and jurisdiction of that court with respect to that matter.

2. Where the office of surrogate of the county is vacant, or the surrogate is disabled by reason of sickness, absence or lunacy, it must exercise all the powers and jurisdiction of that court, until the vacancy is filled or the disability ceases, as the case may be.

§ 10, *Sur. Ct. A.* Former § 2480, *Code Civ. Pro.*

Proceedings in supreme court regulated.

In a special proceeding cognizable before a surrogate, taken in the supreme court, as prescribed in section 10 of this act, the seal of the court in which it is taken, must be used, where a seal is necessary. The special proceeding must be entitled in that court; and the papers therein must be filed or recorded, as the case may be, and issues therein must be tried, as in an action brought in that court. The clerk of that court must sign each record, which is required to be signed by the surrogate or the clerk of the surrogate's court. The issuing of a citation may be directed, and any order intermediate the citation and the decree may be made by a judge of the court.

§ 37, *Sur. Ct. A.* Former § 2507, *Code Civ. Pro.*

Id.; transfer of proceedings to surrogate's court.

The court may, at any time, in its discretion, upon being satisfied that the reason for the exercise of its powers and jurisdiction has ceased to operate, make an order to transfer to the surrogate's court any matter then pending before it. Such an order operates to transfer the same accordingly. Immediately after such a transfer, or after the revocation of the order of the justice of the supreme court as prescribed in section 13, the surrogate must cause entries to be made in the proper book in his office referring to all the papers filed, and orders entered, or other proceedings taken in the supreme court; and he may cause copies of any of the orders or papers to be made, and recorded or filed in his office, at the expense of the county.

§ 38, *Sur. Ct. A.* Former § 2508, *Code Civ. Pro.*

Proof of authority.

The authority of another officer, or, in the county of New York, of the supreme court, to act as prescribed in the last three sections, must be proved in one of the following modes:

1. Where the surrogate is disqualified or precluded from acting in a particular matter, that fact may be proved by the surrogate's certificate thereof. Where the surrogate is temporarily absent, that fact may be proved by the certificate of the surrogate, or of the clerk of the surrogate's court, or of the county clerk.

2. The fact that the surrogate is disabled by reason of sickness, or lunacy, or that the office is vacant, and also the authority of the officer, or of the court, as the case may be, to act in his place, may be proved and are deemed conclusively established by an order of a justice of the supreme court of the judicial district embracing the county.

§ 11, *Sur. Ct. A.* Former § 2481, *Code Civ. Pro.*

The section enables the surrogate who knows he is to be absent, or is unexpectedly detained to make the certificate necessary to confer authority upon another to act. Such certificate can also be made by the clerk of the Surrogate's Court, or by the county clerk. In such a case an application to a Supreme Court judge is not necessary.

Idem, when and how made.

An order may be made as prescribed in subdivision two of the last section upon or without notice, as a justice of the supreme court of the judicial district embracing the county thinks proper. It must recite the cause of the making thereof, and must designate the officer or court empowered to discharge the duties of the office of surrogate. It may, in the discretion of the justice, require an officer to give security for the due discharge of the duties therein. Where the office of surrogate is vacant, or the surrogate is disabled by reason of lunacy, the attorney-general, if directed by the governor must, or the district attorney upon his own motion may, apply, for the order, and a justice of the supreme court of the judicial district embracing the county must grant it upon his application. A justice of the supreme court of the judicial district embracing the county may also grant the order upon the application of a party or a person about to become a party to any special proceeding in the surrogate's court. Where the surrogate is sick, the granting of an order rests in the discretion of the justice, and its effect may be qualified as the justice thinks proper.

§ 12, *Sur. Ct. A.* Former § 2482, *Code Civ. Pro.*

How authority superseded.

Where an order is made by a justice of the supreme court of the judicial district embracing the county, as prescribed in the last two sections, or an appointment is made as prescribed in section 14 of this act for any cause except a vacancy in the office of surrogate, it may be revoked, without prejudice to any proceeding theretofore taken by virtue thereof, by a justice of the supreme court of the judicial district embracing the surrogate's county, upon proof that it was improvidently made, or that the cause of making it has become inoperative. Such an order or appointment, made upon the ground that the surrogate's office is vacant, is superseded without any formal revocation, by the filling of the vacancy. After the order of appointment is revoked, or the vacancy is filled, as the case may be, the unfinished business, in any proceeding taken by virtue of the order or appointment, must be transferred to, and may be completed by,

the surrogate, in the same manner and with like effect as where a new surrogate completes the unfinished business of his predecessor.

§ 13, *Sur. Ct. A.* Former § 2483, *Code Civ. Pro.*

Temporary surrogate; when board of supervisors may appoint.

In any county, except New York, if the surrogate is disabled by reason of sickness, and there is no special surrogate, or special county judge of the county, the board of supervisors, or in the counties embraced within the city of New York, the board of aldermen, may, in its discretion, appoint a suitable person to act as surrogate until the surrogate's disability ceases, or until a special surrogate or a special county judge is elected or appointed. A person so appointed must, before entering on the execution of the duties of his office, take and file an oath of office and give an official bond as prescribed by law with respect to a person elected to the office of surrogate.

§ 14, *Sur. Ct. A.* Former § 2484, *Code Civ. Pro.*

Proceedings, etc., of acting surrogates, where and how recorded.

Where an act is done, or a proceeding is taken by, before, or by authority of, an officer, or a person appointed by the board of supervisors, or by the board of aldermen, temporarily acting as surrogate of any county as prescribed in this act, the same must be recorded, or the proper minutes thereof must be entered, in the books of the surrogate's court, in like manner as if the same were done or taken by, before, or by authority of the surrogate of the county; and the officer or person so acting, or the clerk of the surrogate's court, must sign the certificate of probate and any letters so issued, and must certify the record thereof in the book.

§ 39, *Sur. Ct. A.* Former § 2509, *Code Civ. Pro.*

Reference is made in this section to the proceedings taken under section 14.

Compensation of person acting as surrogate in case of vacancy, disability or disqualification.

An officer, or a person appointed by the board of supervisors, or board of aldermen, who acts as surrogate of any county during a vacancy in the office, or in consequence of disability, as prescribed in this article must be paid, for the time during which he so acts, a compensation equal pro rata to the salary of the surrogate; or in a county where the county judge is also surrogate, to the salary of the county judge. The amount of his compensation must be audited and paid in like manner as the salary of the surrogate, or of the county judge, as the case may be. Where an officer of the county performs the duties of the surrogate with respect to a particular matter wherein the surrogate is disqualified or precluded from acting, the supervisors of the county, or board of aldermen, must allow him a compensation equal pro rata to the salary of the surrogate to be audited and collected in the same manner.

§ 15, *Sur. Ct. A.* Former § 2485, *Code Civ. Pro.*

Effect on special proceeding of vacancy in office or expiration of term of judge.

An action or special proceeding, civil or criminal, in a court of record, is not discontinued by a vacancy or change in the judges of the court, or by the re-election or re-appointment of a judge, but it must be continued, heard and determined, by the court, as constituted at the time of the hearing or determination. After a judge is out of office, he may settle a case or exceptions, or make any return of proceedings, had before him while he was in office, and may be compelled so to do by the court in which the action or special proceeding is pending.

§ 79, *Civ. Prac. A.* Former § 25, *Code Civ. Pro.*

Right of surrogate to complete unfinished business of predecessor.

8. Subject to the provisions of law, relating to the disqualification of a judge in certain cases, to complete any unfinished business, pending before his predecessor in the office, including proofs, accountings, and examinations.

9. To complete, and certify and sign in his own name, adding to his signature the date of so doing, all records or papers, left uncompleted or unsigned by any of his predecessors.

Former § 20, *Sur. Ct. A.* Former § 2490, *subds. 8 and 9, Code Civ. Pro.*

Where a matter has been tried before a former surrogate, but no findings or decision made, his successor may hear and decide the case upon the evidence taken and upon any new evidence. *Matter of Winslow*, 68 N. Y. St. Repr. 692, 34 N. Y. Supp. 637, 12 Misc. Rep. 254; *Matter of Johnson*, 27 Misc. Rep. 167, 58 N. Y. Supp. 601.

The surrogate may complete taking testimony on probate left unfinished by his predecessor and decide the case upon the whole evidence. *Matter of Martinhoff*, 4 Redf. 286.

The surrogate in office may sign a decree made by his predecessor and filed, but not signed by the then surrogate. *Matter of Baird*, 74 Misc. Rep. 34, 133 N. Y. Supp. 729.

¶ 5 Books, Records and Papers of the Surrogate's Office.

Books to be kept by surrogate.

Each surrogate must provide and keep the following books:

1. A record-book of wills, in which must be recorded, at length, every will required by law to be recorded in his office and the decree admitting it to probate.

2. A record-book of letters testamentary, letters of administration and letters of guardianship, in which must be recorded all such letters issued out of his court.

2a. A record-book of testamentary trustees in which must be recorded the names of all persons named in any will or pursuant to any power contained in any will or appointed by the surrogate, together with the instrument by which any such person was designated if designated pursuant to any power contained in any will, who have qualified by taking and filing with the surrogate an oath of office and such bond as may be required by the surrogate, or by filing a consent to accept such appointment duly executed and acknowledged, if such trustee be a trust company or other trustee exempted by law from taking an oath of office.

3. A record-book in which must be recorded every decree whereby the account of an executor, administrator, testamentary trustee, or guardian is settled.

4. A book containing a minute of every paper filed, or other proceeding taken, relating to the disposition of the real property of a decedent, and a record of every order or decree made thereupon; with a memorandum of every report made, and other proceeding taken, founded upon a decree for such a disposition.

5. A book containing a minute or record of every decree or order, the record of which is not required by this section to be kept elsewhere; together with a memorandum of each execution issued, and of the satisfaction of each decree recorded therein.

6. A book in which must be recorded, upon the application of any person, all instruments acknowledged, or proved, and duly certified, settling estates or accounts or assigning, mortgaging, charging or releasing any interest in any estate or fund.

7. A book known as the Court and Trust Fund Register.

8. A book in which all bonds and undertakings filed in his court must be recorded.

The expense of providing the books required by law to be kept and used by the surrogate is a county charge, and such books must be open at all reasonable times to the inspection of any person.

§ 16, *Sur. Ct. A.* Former § 2486, *Code Civ. Pro.*

Books to be indexed; notation on margin as to certain decrees.

To each of the books kept as prescribed in the last section must be attached an alphabetical index referring to the page of the book where each subject may be found. The surrogate may keep two or more books for a further division of the subjects specified in any subdivision of the last section; in which case he must keep a separate index to each set of books. Each decree or judgment affecting a will, its probate or construction, or revoking or otherwise affecting letters testamentary, letters of administration, or letters of guardianship, or suspending or removing a testamentary trustee, or modifying or otherwise affecting any other decree, and any instrument or order appointing or designating any person a testamentary trustee pursuant to a power contained in any will must be plainly noted at the end or in the margin of the record of the will, letters, or original decree, with a reference to the book and page where the subsequent decree is recorded. § 17, *Sur. Ct. A.* Former § 2487, *Code Civ. Pro.*

As to subd. 6 see Real Property Law, § 274; Personal Property Law, § 32; § 251, Surrogates' Court Act.

Subd. 7. See § 33, Surrogates' Court Act.

Papers and books to be preserved.

The surrogate must carefully file and preserve in his office every deposition, affidavit, petition, report, account, voucher, or other paper relating to any proceeding in his court and deliver to his successor all the papers and books kept by him, except that vouchers may be returned to the accounting party after two years, or destroyed after five years from the date of the decree which allowed the payments represented by them.

§ 18, *Sur. Ct. A.* Former § 2488, *Code Civ. Pro.*

What papers to be transmitted to secretary of state or state comptroller.

A surrogate who admits to probate the will of a person who was not a resident of the state at the time of his death, or grants original or ancillary letters testamentary upon such a will, or original or ancillary letters of administration upon the estate of such a person, must, within ten days thereafter, transmit to the secretary of state, to be filed in his office, a certified copy of the will or letters.

The surrogate must, within ten days after granting letters of administration to a county treasurer, transmit to the state comptroller a certified copy of such letters.

§ 19, *Sur. Ct. A.* Former § 2489, *Code Civ. Pro.*

By section 118 the county treasurer, as such, may have letters of administration, and this section requires a copy of the letters issued to him to be sent to the State Comptroller. This is desired by the Comptroller so that he may look after estates which seem to have no living or resident persons interested therein.

CHAPTER II.

Incidental powers of the surrogate in or out of court; control over proceedings and decrees.

- ¶ 6. § 20. Incidental powers of surrogate.
 Power to issue citations and other process; order to show cause.
 Power to adjourn, and to issue supplemental citation, and to allow amendment.
 Power to issue subpoena.
 Power to enjoin and to direct performance of duty.
- ¶ 7. Power over verdict, order or decree, to grant new trial, open or vacate.
- ¶ 8. Power to cure defects and allow amendments.
 Contempt of court, and proceedings to punish therefor.
- ¶ 9. Power to cause the discovery of books and papers.
- § 415. Power to issue order to produce witness.
 Power to discharge from imprisonment.
- § 102. Power to fine sheriff or other officer for neglect to execute process.

¶ 6 Powers of the Surrogate, In and Out of Court.

Incidental powers of the surrogate.

A surrogate, in or out of court, as the case requires, has power:

1. To issue citations and other process authorized by law to parties, in any matter within the jurisdiction of his court; and, in a case prescribed by law, to compel the attendance of a party.

2. To adjourn, from time to time, a hearing or other proceeding in his court; and where all persons who are necessary parties have not been cited or notified, and citation or notice has not been waived by appearance or otherwise, it is his duty, before proceeding further, so to adjourn the same, and to issue a supplemental citation, or require the petitioner to give an additional notice, as may be necessary.

3. To issue, under the seal of the court, a subpoena requiring the attendance of a witness, or of a person, residing or being in any part of the state, for examination as to any matter or subject about which it is necessary or proper for the surrogate to inquire in order that he may properly perform any duty imposed upon him by law; or a subpoena duces tecum requiring such attendance and the production of a book or paper material to an inquiry pending in the court.

4. To enjoin by order, an executor, administrator, testamentary trustee or guardian, to whom a citation or other process has been duly issued from his court, from acting as such until the further order of the court.

5. To require, by order, an executor, administrator, testamentary trustee, or guardian subject to the jurisdiction of his court, to perform any duty imposed upon him by statute, or by the surrogate's court, under authority of a statute.

6. To open, vacate, modify, or set aside, or to enter as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case, and in the same manner, as a court of record and of general jurisdiction exercises the same powers.

7. To punish any person for a contempt of his court, civil or criminal, in any case where it is expressly prescribed by law that a court of record may punish a person for a similar contempt, and in like manner.

8. Subject to the provisions of law relating to the disqualification of a judge in certain cases, to complete any unfinished business pending before his predecessor in the office, including proofs, accountings and examinations.

9. To complete and certify and sign in his own name, adding to his signature the date of so doing, all records or papers left uncompleted or unsigned by any of his predecessors.

10. To exemplify and certify transcripts of all records of his court, or other papers remaining therein, and to search or certify that a document or paper of which the custody legally belongs to him can not be found.

11. With respect to any matter not expressly provided for in the foregoing subdivisions of this section, to proceed, in all matters subject to the cognizance of his court, according to the course and practice of a court having by the common law jurisdiction of such matters, except as otherwise prescribed by statute; and to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred.

12. A surrogate has power to administer oaths, to take affidavits and the proof and acknowledgment of deeds and all other instruments in writing, and certify the same with the same force and effect as if taken and certified by a county judge; and in any proceeding of which he has jurisdiction, he may administer oaths, take affidavits, testimony and depositions, and certify the same at any place within the state of New York, with the same force and effect as if taken in his county.

§ 20, *Sur. Ct. A.* Former § 2490, *Code Civ. Pro.*

There has been added by the Surrogate's Court Act to subdivision 10 the provision regarding making a search of the files formerly in section 961 *Code Civ. Pro.*

The section applied.

Subd. 1. Power to issue citation and other process. See ¶ 26.

Under the revision, the citation "to attend" is abrogated, and the general citation is one "to show cause," which form

does not command the attendance of a party. Where the attendance of a party is demanded, an order to show cause is to be used.

Order to show cause before the revision.

This section is authority for an order to show cause returnable in less than eight days. *Matter of Filley*, 47 N. Y. St. Repr. 428, 20 N. Y. Supp. 427. This case arose under an order to show cause granted to be used in place of a notice of motion.

Proceedings to set aside or open a judgment may be begun by an order to show cause. *Cluff v. Tower*, 3 Dem. 253; *Matter of Filley*, *supra*.

For cases showing the history and growth in use of orders to show cause see *Matter of Stein*, 33 Misc. Rep. 542, 68 N. Y. Supp. 933.

Subd. 2. Power to adjourn.

Where the surrogate has jurisdiction of the subject matter, he has the power to adjourn the proceeding from time to time as occasion requires. Whether an adjournment should be granted or refused rests in his sound discretion, subject to review on appeal. *Paine v. Aldrich*, 133 N. Y. 544, 44 N. Y. St. Repr. 308; *Borley v. Wheeler & W. Mfg. Co.*, 34 N. Y. St. Repr. 987, 12 N. Y. Supp. 45.

Adjournment allowed upon terms.

In *Matter of Bodkin*, 88 App. Div. 33, 84 N. Y. Supp. 552, the court approved of an adjournment allowed upon requiring the applicant to pay over certain money.

Supplemental citation. See ¶¶ 26, 27.

A supplemental citation need not be marked "supplemental." *Matter of Bradl y*, 70 Hun, 104, 53 N. Y. St. Repr. 504, 23 N. Y. Supp. 1127.

If the moving party does not take out supplemental citation any party interested may do so. *Matter of Laytin*, 15 Misc. Rep. 660, 74 N. Y. St. Repr. 291, 37 N. Y. Supp. 1125.

The surrogate has authority to issue a supplemental citation for the purpose of bringing into the proceeding which has already been initiated those parties who are necessary to be in court that there may be a complete determination of the matter. *Matter of Phalen*, 51 Hun, 208, 21 N. Y. St. Repr. 34, 4 N. Y. Supp. 408.

The surrogate's right and duty to bring in an interested party who has not been named in the original citation is in furtherance of equity. *Matter of Ibert*, 48 App. Div. 510, 62 N. Y. Supp. 1051. *In re Reis*, 170 App. Div. 951, 155 N. Y. Supp. 1136.

If a necessary party has been left out a supplemental citation may be issued to him at any time before decree is made. *Matter of Wheeler*, 48 Misc. Rep. 323.

A supplemental citation should be issued upon proof made to the surrogate showing reasons why the party is interested. *Matter of Bingham*, 127 N. Y. 306, modifying 38 N. Y. St. Repr. 765.

Where a party named in a citation dies before service thereof on him, a supplemental citation should be issued, for service on the legal representative not named in the citation will not give jurisdiction, neither will service upon tenants of the property not so named. *Matter of Georgi*, 35 Misc. Rep. 685, 72 N. Y. Supp. 431.

Citation may be amended.

Section 105, Civ. Prac. A., is applicable to Surrogate's Court.

Where executors were named in the citation personally, the surrogate amended the citation on their motion to dismiss the proceedings, by adding the words "as executors." *Matter of Soule*, 46 Hun, 661, 12 N. Y. St. Repr. 692; *aff'd*, 109 N. Y. 662.

Effect of failure to serve citation. See ¶ 24.

Where a citation is issued but not properly served, a supplemental citation may issue and the proceeding will not fail

for lack of service of the original citation. *Matter of Bradley*, 70 Hun, 104, 53 N. Y. St. Repr. 540, 23 N. Y. Supp. 1127; *Matter of Gouraud*, 95 N. Y. 256, revg. 28 Hun, 560.

Where after citation is issued, the petitioner wilfully refrains from serving the citation, the surrogate may dismiss the proceedings under his power given by section 20 subd. 11, Sur. Ct. A. *Matter of Friedell*, 46 N. Y. Supp. 787.

Subd. 3. Power to issue subpoena.

The language of this subdivision has been broadened so as to include all cases where it is necessary to issue a subpoena, and the special references to issuing a subpoena have been omitted from the various sections.

As representatives are often strangers to the affairs of the persons whose estates they represent, it is necessary for them to obtain information concerning many things of which they have no personal knowledge. When such information will not be given voluntarily, it may be obtained through a subpoena.

A subpoena may be issued in any matter where a petition has been filed and the representative states that he has not sufficient knowledge of the facts to make a complete and full petition, or to present to the court to give it information upon which to base a decree or order.

Some attorneys seem to think it necessary to have a subpoena signed by the clerk of the court, and take considerable trouble upon themselves to get it so signed. There seems to be no necessity for this, as the attorney, where one has appeared of record in the proceeding, has authority to sign a subpoena as he does when issuing one in any other court of record.

Section 24, Code Civ. Pro., which gave this authority to attorneys, seems to have been now repealed, but the same provision is found in Rule 13, Rules of Civil Practice.

Subd. 4. Power to enjoin.

The surrogate should not enjoin representatives when acting in the orderly discharge of their duties because of disagreements among themselves. *Brennan v. Lane*, 4 Dem. 322.

Where letters have been revoked the surrogate has no power to enjoin a representative from using the funds of the estate. *Breslin v. Smyth*, 3 Dem. 251.

An order to give further security by an administrator was granted, and an appeal taken — *held*, that the appellate court had power to stay the administrator from wasting the estate pending appeal, and not the surrogate. *Vreedenburgh v. Calf*, 9 Paige, 129.

A surrogate has power to stay accounting proceedings in a proper case. *Matter of Farrell*, 125 App. Div. 702, 110 N. Y. Supp. 41. A stay in an action or proceeding is based upon the regulatory power possessed by the court over the parties and their attorneys; it is an administrative function and largely rests in the sound discretion of the court. *Curlette v. Olds*, 110 App. Div. 599, 97 N. Y. Supp. 144. While usually granted on the ground of a former action pending, the grounds for its exercise are various, and the true test is whether equity and justice require it. *In re Sherwood*, 105 Misc. Rep. 183, 173 N. Y. Supp. 639.

Subd. 5. Directing performance of duty.

The surrogate may order an executor to disaffirm a conveyance of the deceased in a proper case and bring an action to set aside the deed. *Lichtenberg v. Herdtfelder*, 103 N. Y. 302, distinguishing 39 Misc. Rep. 17, 78 N. Y. Supp. 769. See ¶ 262.

An order to grant inspection of a prior will by a temporary administrator should not be granted under this section. *Matter of Woodward*, 28 Misc. Rep. 602, 59 N. Y. Supp. 1080.

The surrogate cannot make an order directing refunding of percentage and expenses in sale of real estate to pay debts where fraud and concealment is alleged. *Wolfe v. Lynch*, 2 Dem. 610; approved 6 Dem. 63, 17 N. Y. St. Repr. 10, 1 N. Y. Supp. 276.

The surrogate has no jurisdiction to order an executor or administrator to turn over rents of real estate devised or descended which he has improperly collected. *Calyer v. Calyer*, 4 Redf. 305; *Marston v. Paulding*, 10 Paige, 40; *Shumway v. Cooper*, 16 Barb. 556.

Husband had insurance policy payable to executor for benefit of his widow — *held*, that the right of the widow to collect the money from the executor was not a claim, debt, or legacy, and the surrogate had no jurisdiction in the matter. *Matter of Vandermore*, 42 Hun, 326, 3 N. Y. St. Repr. 713.

¶ 7 *Idem*; Power Over Verdict, Order or Decree, to Grant New Trial, Open or Vacate.

Subd. 6. Power over order and decree.

Like all other courts the Surrogates' Courts have power to amend, vacate, or open their own orders and decrees, and to grant a new trial or a new hearing.

Power to grant a new trial. See ¶ 6, § 20, subd. 6, ¶ 31, § 69.

The Surrogate's Court has power to "grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause." (Sur. Ct. A. § 20, subd. 6.) The powers, conferred by this subdivision, must be exercised only in a like case and in the same manner, as a court of record and of general jurisdiction exercises the same powers. It is the general rule that a motion for a new trial upon the ground of newly-discovered evidence should be made upon a case containing the evidence as well as upon affidavits. (Civ. Prac. A., § 575; *Bridenbecker v. Bridenbecker*, 75 App. Div. 6; *Hanor v. Housel*, 128 id. 801; *Pease v. Pennsylvania R. R. Co.* 137 id. 458, 122 N. Y. Supp. 787; *aff'd*, 203 N. Y. 573. Rule 221 of General Rules of Practice. Notwithstanding this, if the parties consent that the motion may be heard upon the pleadings and affidavits without a case, the court has power to entertain it. *Russell v. Randall*, 123 N. Y. 436; *McIver v. Hallen*, 50 App. Div. 441; *Rosenthal v. Bell Realty Co.*, 53

Misc. Rep. 265; *Matter of Rose*, 153 App. Div. 263, 137 N. Y. Supp. 1079.

Affidavits of the persons from whom new and additional testimony is expected to be obtained must be presented or good reason for such failure given. *Matter of Collins*, 6 Dem. 286.

In order to entitle the appellant to a new trial upon the ground of newly-discovered evidence, he must show that the existence of the alleged new evidence was unknown to him at the time of the trial and that it could not have been discovered by him in the exercise of proper diligence, or that he was misled and induced to refrain from making certain proof because of excusable mistake or by some act or admission of the respondent upon which he had a right to reply.

A new trial will not be granted on account of inattention, negligence, or misconduct of counsel, nor on an allegation of newly-discovered evidence which might have been known except for such negligence of counsel. *Matter of Quin*, 22 N. Y. St. Repr. 338; 1 Con. 381; 5 N. Y. Supp. 261; *Olmsted v. Long*, 4 Dem. 44.

The surrogate may declare a mistrial on account of the improper conduct of a juror in discussing a probate case with one of the interested parties. *Matter of Arams*, 97 Misc. Rep. 221, 162 N. Y. Supp. 863.

Correcting, opening or vacating decree.

A proceeding to correct, open or vacate a decree may be begun by the service of an order to show cause or notice of motion, and it is not necessary to issue and serve the usual citation. In a proper case such order to show cause may be directed to be served by mail upon a non-resident. *Matter of Smith*, 65 Misc. Rep. 417; 121 N. Y. Supp. 1087.

Opening decree.

If a party brought into Surrogate's Court by citation, through mistake or inadvertence or from any excusable cause,

fails to appear and a decree is entered against him, the court has the power to open the decree and let him be heard. Some expressions are found in the opinions in *Matter of Tilden*, 98 N. Y. 434 and *Matter of Hawley*, 100 id. 206, seeming to limit the power of the Surrogate's Court in this respect; but in *Matter of Henderson*, 157 id. 426, these decisions are commented upon and a much broader view taken of the inherent powers of so important tribunals as are the various Surrogates' Courts of the State. As early as *Pew v. Hastings*, 1 Barb. Ch. 452, it was distinctly held that a surrogate had the power to open a decree taken by default in consequence of a mistake or an accident, on the principle that such power is absolutely essential to the due administration of justice, and it is upon this principle that *Matter of Henderson* (*supra*), was decided. To the same effect is *Matter of Flynn*, 136 N. Y. 287 and *Matter of Traver*, 9 Misc. Rep. 621.

Petition not granted where settlement had been made under the decree and a release from petitioner filed, and the only question to be raised was one of law — allowance of too much commissions. *Ricard v. Laytin*, 2 Dem. 587.

Surrogate has power to open a decree taken by default. *Pew v. Hastings*, 1 Barb. Ch. 452.

Allegations of errors of law in a decree are not good ground for opening a decree. "Or other sufficient" in subdivision 6 means "other like cause." *Matter of Hawley*, 100 N. Y. 206; *rev'g.*, 36 Hun, 258; *Matter of Tilden*, 98 N. Y. 434.

The proceeding cannot be used as a means of reviewing the decree of the Surrogate's Court for errors of judgment as to questions of law or fact. Such errors can be corrected only by appeal. *Matter of Gaffney*, 116 App. Div. 583; *aff'd*, 189 N. Y. 503.

Surrogate may open a decree to correct a mistake of fact where there was an error of figures in the account and decree. *Campbell v. Thatcher*, 54 Barb. 382.

Vacating and correcting.

Where a representative was charged with assets that had come to the hands of the deceased executor, but not to his hands, and the time to appeal had expired, amendment was refused. *Matter of Seaman*, 63 App. Div. 49, 71 N. Y. Supp. 376.

A decree or order vacating a satisfaction of a decree to protect an attorney's lien is within the power of a surrogate and is a final order. *Matter of Regan*, 167 N. Y. 338.

Where application is made to vacate a decree and no fraud or clerical error is charged this section does not authorize action by the surrogate. *Matter of Hawley*, 104 N. Y. 250.

Application by surety.

The decree will not be opened on the application of a surety who was not made a party, in the absence of fraud. *Matter of Bodine*, 119 App. Div. 493.

A surety upon the official bond of an administrator, or one standing in the shoes of such surety, can not maintain an action setting aside the decree of a Surrogate's Court of competent jurisdiction settling and passing such administrator's accounts in the absence of fraud leading up to such decree. *Matter of Bodine*, 119 App. Div. 493. See, also, *Deobold v. Oppermann*, 111 N. Y. 531; *Kelly v. West*, 80 id. 139; *Bodine v. Williamson*, 134 A. D. 688.

Right to open decree of probate. See ¶ 73.

A surrogate has power after the testimony has been closed and the case submitted to grant an order on motion opening the case to allow a witness to correct his testimony. *Martinhoff v. Martinhoff*, 81 N. Y. 641.

A decree of probate may be opened to permit a former contestant to ask for a construction of the will. *Matter of Keeler*, 5 Dem. 218.

A decree of probate may be opened on application of necessary party not cited, but should not be revoked. *Matter of Odell*, 1 Pow. Sur. Rep. 408.

Setting aside service of citation.

In a proper case the service of a citation may be declared void, and decree of probate opened. The application may be brought on by an order to show cause. *In re Norwood*, 111 Misc. Rep. 530, 181 N. Y. Supp. 494.

In view of the repeal of former section 2653A of the Code of Civil Procedure, the result of a default on the part of contestants in a probate proceeding is much more serious than it formerly was, and in consideration of that fact a certain liberality in opening such defaults is excusable. *In re Wolfe*, 181 A. D. 35; 168 N. Y. Supp. 264.

Application to vacate a decree of probate and for new trial not made at the close of the trial, should be made on a case and exceptions. *In re Paschal* (N. Y. Co.), 106 Misc. Rep. 214, 174 N. Y. Supp. 418.

Application to open hearing on transfer tax proceeding. See ¶ 163.

While the surrogate has power to vacate an order and grant a new hearing, he will not do so when the error complained of was not of fact, but of law, and no appeal has been taken. *Matter of Litchfield*, 47 N. Y. Law J. 1747.

Although the party was in default and has not appealed, yet the surrogate may vacate the order assessing a tax against him where there was a mistake as to the right so to assess such transfer, the party being exempt. *Matter of Townsend*, 153 App. Div. 85; 138 N. Y. Supp. 191.

Where an affidavit misstates the correct computation of the value of property, it is a clerical error, and the order will be opened to correct the error although more than two years have elapsed. *In re Boyle*, 92 Misc. Rep. 143, 156 N. Y. Supp. 173.

Void order or decree may be vacated on motion.

Where an order or decree is void for lack of jurisdiction or other sufficient cause, the question arises as to the proper practice to be adopted to have the order and decree annulled of record.

An appeal from an *ex parte* order or decree will not lie. And in those cases where an appeal may be taken it is not necessary for a party apparently affected by the order or decree to secure an annulment by appeal, but he may do so by a motion to vacate. That the Surrogate's Court, though a court of inferior jurisdiction, has inherent power over its own records sufficient to expunge therefrom orders and decrees placed there without authority cannot be doubted. *In re Tucker*, 108 Misc. Rep. 425, 178 N. Y. Supp. 446.

Nothing contained in subdivision 6, section 20, of the Sur. Ct. A. can be construed to deprive the court of this power, even if it cannot be there plainly seen that the power is in terms conferred. *Matter of Armstrong*, 72 App. Div. 286, 76 N. Y. Supp. 37; app. dism., 72 App. Div. 620, 76 N. Y. Supp. 40.

In *Kamp v. Kamp*, 59 N. Y. 212, the court said: "The want of jurisdiction makes the order and judgment of the court and the record of its action utterly void and unavailable for any purpose, and the want of jurisdiction may always be set up collaterally or otherwise * * * but he (the party apparently affected) is at liberty by a more direct and summary proceeding to have them set aside and vacated."

In *Skidmore v. Davies*, 10 Paige, 316, the chancellor said: "If the first order had been irregular, as the appellant supposed, his remedy was not by appeal to the chancellor, but an application to the surrogate to set aside the order as irregular was the proper course." In *Vreedburgh v. Calf*, 9 Paige, 129, the chancellor said: "And if the order * * * was entered when the surrogate had no power to enter such an order, he not only had the right, but it was his duty to set it aside for irregularity." In *Sipperly v. Baucus*, 24 N. Y. 46, the foregoing cases are reviewed and commended as to the power and duty of the surrogate.

Seaman v. Whitehead, 78 N. Y. 306, was a case in which the surrogate denied a motion to vacate that part of a decree which directed the payment of a sum of money which the sur-

rogate had no authority to direct to be paid. The Court of Appeals said: "The question arising in such a case relates to the jurisdiction of the surrogate, and could properly be raised by a motion to set aside the order upon that ground. If void, it should have been vacated for that reason, and an appeal lies from an order denying the motion to vacate."

Matter of Underhill, 117 N. Y. 471, was a case arising under the law relating to Surrogates' Courts, as appeared in the Code of Civil Procedure. In that case the surrogate had vacated on motion so much of a decree in final accounting as gave an unauthorized judgment against a legatee. The court in affirming the order said: "And it is a judgment which the surrogate was, as we have seen, wholly without any jurisdiction to enter. He cannot obtain jurisdiction to enter it by formally making it a part of a decree which he has authority to make, nor does he by such a movement change its essential character of a separate judgment liable to be set aside on motion, as was done in this case."

Time within which application may be made.

Before the general amendments made in 1914 it was held that sections 1282 and 1290 Code Civ. Pro., which limited the time to move to set aside a final judgment for irregularity or vacate a final judgment for an error in fact to one year and two years respectively, did not apply to Surrogates' Courts.

Section 2770 Code Civ. Pro. made all sections of the code apply to Surrogates' Courts unless a contrary intent was shown in the language used, and therefore there is doubt about the force of the earlier decisions.

The decisions made as to the time limit of moving to correct or vacate, should be considered with reference to the present section 316 Sur. Ct. A., which expressly makes the general provisions of law and the rules of court applicable to Surrogates' Courts.

Notwithstanding this doubt, Mr. Surrogate Fowler in *Matter of Severance Est.*, 106 Misc. Rep. 710, 175 N. Y. Supp. 458 (1919), wrote as follows:

"In *Matter of Henderson*, 157 N. Y. 423, 52 N. E. 183, it was held that a surrogate may vacate his decree in the furtherance of justice, although more than two years have elapsed since the entry of the decree, and that the time when and the circumstances under which the power may be exercised are questions addressed to the court in which the application is made. This authoritative decision has been followed in a large number of other cases in this state. *Matter of Coogan*, 162 N. Y. 613, 57 N. E. 1107; *Matter of O'Berry*, 179 N. Y. 285, 72 N. E. 109; *Matter of Morgan*, 215 N. Y. 703, 109 N. E. 1084; *Matter of Scott*, 208 N. Y. 602, 102 N. E. 1113; *Matter of Backhouse*, 110 App. Div. 737, 96 N. Y. Supp. 466; *Matter of Weiler*, 139 App. Div. 905, 124 N. Y. Supp. 1133. The right of the surrogate's court to vacate its decree, to consider newly discovered evidence and make a new decision based on such evidence, was sustained in the *Matter of Willets*, 119 App. Div. 119, 100 N. Y. Supp. 850, 104 N. Y. Supp. 1150; *aff'd*, 190 N. Y. 527, 83 N. E. 1134. It is therefore apparent that the surrogate has jurisdiction to vacate or modify his decree, although more than two years have elapsed since its entry, and to grant a new trial on the ground of fraud or newly discovered evidence."

An interested person not cited may institute a new proceeding. See ¶ 73.

A party interested who has not been cited, and who, therefore, is not bound by the order or decree made in the proceeding, need not in certain cases move to vacate the decree or order, but he may demand that as to him the proceeding shall be conducted *de novo*.

Accounting.

Where an accounting had been had to which certain parties were not cited, who were cited upon a subsequent accounting, *held* that it was not proper to vacate the decree in the first accounting, but that such parties could proceed as though no accounting had been had. *Matter of McCunn*, 15 N. Y. St. Repr. 712.

A person entitled to be cited on an accounting who has not been cited or who has not appeared may maintain a new proceeding for an accounting. *Matter of Killan*, 172 N. Y. 547; *Matter of Hasselbrook*, 128 App. Div. 874, 113 N. Y. Supp. 97.

Probate.

Where a party entitled to notice of probate has been omitted a citation to show cause may be issued to him in the proceeding, and his objections, if any, may be tried as they would have been had he been made a party to the original probate. *Matter of Crumb*, 6 Dem. 478, 18 N. Y. St. Repr. 254, 2 N. Y. Supp. 744.

¶ 8 Idem; Power to Allow Amendments; Punish for Contempt; Take Testimony Out of the County.

Power to cure defects and allow amendments.

By the Sur. Ct. Act, section 316, sections 105 and 109 of the Civ. Prac. Act are made applicable to Surrogates' Courts, so far as they can be applied to the substance and subject matter of the proceeding, without regard to its form. See *Matter of Soule*, 6 Dem. 137, 11 N. Y. St. Repr. 695, 13 Civ. Pro. Rep. 171.

An amendment may also be allowed under § 42 (¶ 16) where objection is made to a decree because it does not recite all the jurisdictional facts, or because an intermediate proceeding has not been duly taken.

In *White v. Emigrant, etc.*, 146 App. Div. 591; aff'd, 205 N. Y. 571, the amendment of an order granting temporary letters of administration, and the granting of full letters *nunc pro tunc* was approved.

Defects may be cured by verdict or decree, and defects supplied.

Consult Civil Practice Act for general provisions regarding curing of defects by verdict, judgment or amendment, and relief therefrom.

Contempt of court, and proceedings to punish therefor. Subd. 7.

The surrogate has power "to punish any person for a contempt of his court, civil or criminal, in any case where it is expressly prescribed by law that a court of record may pun-

ish a person for a similar contempt and in like manner." § 20, subd. 7, Sur. Ct. A.

Criminal contempts defined.

A court of record has power to punish for a criminal contempt, a person guilty of either of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Willful disobedience to its lawful mandate.

4. Resistance willfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

§ 750, *Judiciary Law*.

For provisions regarding criminal contempts see Judiciary Law sections 750-754.

For proceedings to punish a contempt civilly see Judiciary Law sections 754-781. Also § 84 Sur. Ct. A. ¶ 34.

Service of a copy of an order to pay money on behalf of a person is not a "personal demand" required by section 756 of the Judiciary Law. *Union Trust Co. v. Gage*, 6 Dem. 358, 15 N. Y. St. Repr. 718.

Punishment of witness for refusal to answer.

A witness in Surrogate's Court may be punished for refusing to answer proper questions, and he may also be fined therefor. *Matter of Jones*, 6 Civ. Pro. Rep. 250; *Matter of Taylor*, 8 Misc. Rep. 159, 60 N. Y. St. Repr. 136, 28 N. Y. Supp. 600.

Enforcing decrees and orders by contempt proceedings. See ¶ 34.

Subds. 8 and 9. Power to complete unfinished business of predecessor. See ¶ 4.

Subd. 11. Power to correct record.

Where a will has been incorrectly recorded in the book of wills, the surrogate has authority to direct a correction of the record. *In re Davis Will*, 99 Mis. Rep. 447; 164 N. Y. Supp. 143.

Subd. 12. Power to take testimony out of the county.

An additional power has been given by the revision authorizing the surrogate to take depositions and other testimony out of his county. There is no good reason why a surrogate should not cross the border line of his county and take the deposition of a subscribing witness, instead of being obliged to send the papers to the surrogate of another county and perhaps compel him to travel many miles to reach the witness who may live very close to the surrogate of original jurisdiction. See ¶ 32.

¶ 9 Power to Cause Discovery of Evidence; Order Production of Witness and Discharge from Imprisonment.**Power to cause the discovery of books and papers.**

A surrogate has jurisdiction to compel a party to a special proceeding pending before him to produce and discover or to give to the other party an inspection and copy or permission to take a copy of a book, document, or other paper in his possession or under his control, relating to the merits of the special proceeding or the defense thereof.

The general rules of practice of the Supreme Court prescribe the cases in which such discovery or inspection may be compelled and they should be consulted in connection with sections 324-327 Civil Practice Act, for the practice relating thereto.

Reason for ordering discovery—Even in foreign country.

“This court has jurisdiction because the exēcutors and trustees have sought its aid and because all the interested parties are before it. It has jurisdiction because in order to

authorize the sale of the real estate here situate, the exact situation of the whole estate is necessary for a determination. Executors and trustees under a last will and testament hold, perhaps, the highest fiduciary relation known to the law. They owe to the court and to their *cestuis que trustent* the utmost frankness of explanation of their dealings with their trust estate. When they come asking advice and aid in the performance of their trust, the court can view with little patience obstacles interposed by them to prevent a full disclosure of the facts.

Under such circumstances the order appealed from was proper to put the *cestuis que trustent* and the court in possession of the facts necessary to a determination of the ultimate issue of this litigation.

The order appealed from, while it provides for an inspection of the books and papers in a foreign country, must be considered in view of the fact that those books and papers are the books and papers of these plaintiffs who here come into court asking advice in regard to the very estate of which these books and papers contain the record.

The order also provided that in lieu of the originals the plaintiffs could produce certified copies, and further provided that the expense of compliance with this order should be paid by the estate. Both these provisions were wise and proper." *Muller v. City of Philadelphia*, 118 App. Div. 276, 103 N. Y. Supp. 387; aff'g, 49 Misc. Rep. 322, 99 N. Y. Supp. 194.

Discovery of books and papers.

The surrogate has no power under section 40, Sur. Ct. A., to cause a discovery of books and papers in the hands of a temporary administrator for the benefit of contestants of a will. *Bale v. Stokes*, 5 Redf. 586.

Discovery was allowed to an executor who brought an action to recover for the conversion of securities of the deceased in the hands of the defendants. *Allen v. Allen*, 33 N. Y. St. Repr. 876, 11 N. Y. Supp. 535.

Where an action is brought against a surviving partner for an accounting, an examination of the firm books may be had to ascertain the condition of the business at the date of death. *Fleischmann v. Fleischmann*, 54 App. Div. 202, 66 N. Y. Supp. 631, aff'g, 31 Misc. Rep. 216, 65 N. Y. Supp. 92.

Discovery proceedings are made applicable to Surrogate's Court, and the many stringent rules adopted in applying the proceeding must be observed by surrogates when such applications are made. *Matter of Woodward*, 28 Misc. Rep. 602, 59 N. Y. Supp. 1080.

In an action against the representative of a deceased physician, an examination of his professional books kept by him was not allowed. *Lowenthal v. Leonard*, 20 App. Div. 330, 46 N. Y. Supp. 818; reported below, 20 Misc. Rep. 420, 45 N. Y. Supp. 1031.

These proceedings cannot be maintained by an executor to ascertain the contents of a safe-deposit box as against an alleged owner of the securities claimed to be in such box. *Hallenbeck v. Parr*, 65 App. Div. 167, 72 N. Y. Supp. 488.

Examination before trial in probate proceedings.

Under § 316 the surrogate has power to make an order for the examination of a party or witness in a probate proceeding before trial. Whether he will grant the order is in his discretion, but he has undoubted authority to do so. *People ex rel Lewis v. Fowler*, 229 N. Y. 84; *In re Carter's Will*, 193 A. D. 355, 184 N. Y. Supp. 39.

Power to issue order to produce witness.

Consult Civ. Prac. A., §§ 415 to 420.

Order to bring up prisoner as witness.

A court of record, other than a justice's court of a city, or a judge of such a court, or a justice of the supreme court, has power, upon the application of a party to an action or special proceeding, pending therein, to make an order for the purpose of bringing before the court a prisoner, detained in a jail or prison within the state, to testify as a witness in the action or special proceeding, in behalf of the applicant.

§ 415, Civ. Prac. A. Former § 2008, Code Civ. Pro.

Order; when allowed by judge.

Such an order may also be made by a justice of the supreme court upon the application of a party to a special proceeding, pending before any officer or body, authorized to examine a witness therein. In a case specified in this section, the order may also be made by a county judge, or a special county judge, residing within the county where the officer resides, before whom, or the court or other body sits, in or before which the special proceeding is pending.

§ 416, *Civ. Prac. A.* Former § 2009, *Code Civ. Pro.*

Power to discharge from imprisonment.

Consult Debtor and Creditor Law, §§ 120-138.

Who may be discharged.

A person imprisoned by virtue of an execution to collect a sum of money, issued in a civil action or special proceeding, may be discharged from the imprisonment, as prescribed in this article. A person who has been admitted to the jail liberties, is deemed to be imprisoned, within the meaning of this article.

§ 120, *Debtor and Creditor Law.*

To what court application to be made.

Application for such a discharge must be made by petition, addressed to the court from which the execution issued; or to the county court of the county in which he is imprisoned; or, if he is imprisoned in the city of New York, to the supreme court.

§ 121, *Debtor and Creditor Law.*

Surrogate may fine sheriff or other officer for neglect to execute process.

5. Who willfully neglects to execute a mandate, authorized by law to be issued, by a judge or other officer, in a special proceeding, may be fined by the judge, in a sum not exceeding twenty-five dollars, and is liable to the party aggrieved for his damages sustained thereby.

§ 102, *subd. 5, Civ. Prac. A.* Former § 103, *Code Civ. Pro.*

CHAPTER III.

Appointment and compensation of clerks, stenographers and other officers of the Surrogates' Court; their duties and fees.

- ¶ 10. § 21. Clerks in surrogates' offices; appointment and salary.
- § 22. In Kings county.
- § 23. Court officers and attendants.
- § 24. Interpreters.
- § 25. Stenographers in certain counties.
- § 26. Stenographers in other counties.
- § 27. Duty of stenographers.
- § 28. Minutes of testimony.
- ¶ 11. § 29. Fees for copying and recording papers.
- § 30. Fees of stenographer.
- § 31. Expenses of surrogate or clerk.
- ¶ 12. § 32. Powers and duties of clerks.
- Searching files and making certificate.
- § 33. Keeping court and trust fund register.

¶ 10 Appointment and Compensation of Clerks, Stenographers and Other Officers of the Surrogates' Courts.

Clerk and deputy clerk of surrogate's court, and clerks in surrogate's office; appointment; salary.

By a written order filed and recorded in his office, which he may in like manner revoke at pleasure, a surrogate may appoint a clerk of the surrogate's court, and in any county containing a city of the second class, and in the counties of Monroe and Erie the surrogate may also appoint a deputy clerk of said court, and in the counties of Cayuga, Chautauqua and Cattaraugus, the surrogate may designate one of his clerks to act as deputy clerk of said court. Each surrogate may appoint, and at pleasure remove, as many other clerks for his office, to be paid by the county, as the board of supervisors of his county, or in the city of New York the board of aldermen, authorize him so to appoint. The board of supervisors or, in the counties embraced within the city of New York, the board of aldermen, as the case requires must fix the compensation of the clerk or clerks appointed under this section; and may authorize them, or either of them, to receive, for their or his own use, any legal fees permitted to be charged by law. A surrogate may appoint, and at pleasure remove, as many additional clerks to be paid by him as he thinks proper.

§ 21, *Sur. Ct. A.* Former § 2491, *Code Civ. Pro.*

Chapter 775, L. 1911, supersedes this section in its application to the surrogates of New York county. See chap. 530, L. 1884.

Surrogates of New York county may appoint clerks, officers and attendants, and fix and regulate salaries and fees.

§ 1. On and after the passage of this act, the board of aldermen and the board of estimate and apportionment of the city of New York shall cease to have or exercise any powers in regard to the appointment of surrogates of the county of New York, or in regard to the appointment, number and salaries of assistants to such surrogates, or of other clerks, employees or subordinates in or attached to the office of said surrogates, or in regard to the receipt or payment of fees in said office. * * *

§ 3. The surrogates may appoint and remove all clerks, officers, attendants and employees in their office, or connected with their court. The compensation of each person so appointed shall be fixed by the surrogates, and the same shall be a county charge, and the number and duties of all such clerks, officers, attendants and employees shall be such as the surrogates shall designate and approve.

From Chap. 775, Laws 1911.

Chief clerk of surrogate's court of Kings county; compensation of clerks and officers.

The surrogate of the county of Kings may appoint a chief clerk of the court and office of such surrogate, who shall hold office for five years unless sooner removed by the surrogate for cause, after trial, upon charges duly served upon him and an opportunity to be heard and defend. Whenever a vacancy exists for any cause in such office, the surrogate shall appoint a person to fill such office for the full term of five years. Such chief clerk shall, before entering upon the performance of his duties, take the constitutional oath of office and shall file the same with the county clerk of Kings county, together with a bond in the sum of ten thousand dollars, with sureties approved by the surrogate, conditioned for the faithful performance of his duties as such chief clerk. Such chief clerk shall perform such duties as now pertain to the office of chief clerk and clerk of the surrogate's court in such county, and such other duties as the surrogate may from time to time by rule of the court or otherwise impose upon him. The compensation of such chief clerk and of the other clerks and officers of the court and office of such surrogate shall, notwithstanding any other provision of law, be fixed by the said surrogate, and the same shall be a county charge. The compensation of the chief clerk shall not be decreased during his term of office.

A surrogate's clerk must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records and dockets in the surrogate's office; and either make one or more transcripts therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper cannot be found in such office.

§ 22, *Sur. Ct. A.* Former § 2492 and § 961, *Code Civ. Pro.* combined.

By an apparent oversight section 961 Code Civ. Pro. which applies to all surrogates' clerks has been combined with a section dealing exclusively with the chief clerk of the Surrogate's Court of Kings county.

Appointment of court officers and attendants.

The surrogate of Kings county may appoint, and at pleasure remove, all attendants, messengers and court officers in his court, who must attend, from day to day, the terms and sittings of the court to preserve order, and to perform whatever services may be required of him by the surrogate.

The surrogates of Erie, Bronx, Queens and Richmond counties may severally appoint, and at pleasure remove, as many attendants, messengers and court officers in their courts, to be paid by the county, as the board of supervisors, of Erie county or the board of estimate and apportionment of the city of New York, respectively, authorize them so to appoint. The court officer or officers so appointed shall possess all the powers of officers designated by sheriffs to attend upon courts, and shall perform whatever services may be required by the surrogate.

The surrogate of any other county may appoint, and at pleasure remove, one or more court officers to attend his court and to perform such duties in respect thereto as the said surrogate may prescribe, who shall be paid by the county treasurer upon the certificate of the surrogate, such compensation as may be fixed and determined by the board of supervisors of said county.

§ 23, *Sur. Ct. A. Former § 2493, Code Civ. Pro.*

The last part provides generally for a court officer or attendant to preserve order, look after books and papers, and in some counties to look after fires and lights and to open and close the room.

Interpreters in surrogate's court of Kings county.

The surrogate of Kings county must from time to time appoint and may at pleasure remove an interpreter to be attached to the surrogate's court of said county. Such interpreter shall receive a salary of eighteen hundred dollars per annum to be paid by the comptroller of the city of New York, in monthly instalments, and shall, before entering upon his duties, file in the office of the clerk of the county of Kings the constitutional oath of office in which there shall also be incorporated language to the effect that he will fully and correctly interpret and translate each question propounded through him to a witness and each answer thereto in said courts. The compensation for the above interpreter shall be taken out of the amount appropriated for the support of the said surrogate's court, or from any other contingent city fund.

§ 24, *Sur. Ct. A. Former § 2494, Code Civ. Pro.*

Temporary appointment of interpreters.

If the services of an interpreter be required in any court of record other than a local city court and there be no unemployed official interpreter to act therein, the court may appoint an interpreter to act temporarily in such court. Such interpreter shall before entering upon his duties file with the clerk of the court the constitutional oath of office. The court shall fix the compensation of such interpreter at not more than five dollars per day for each day's actual attendance by direction of the presiding judge or justice and such compensation shall be paid from the court fund of the county upon the order of the court.

§ 388, *Judiciary Law.*

Stenographer for surrogate's courts in New York, Kings, Erie, Albany, Westchester, Monroe and Queens counties.

The surrogate of each of the counties of New York, Kings, Queens, Erie, Albany, Monroe and Westchester must appoint, and may, for cause, remove, a stenographer for his court.

In the counties of New York and Kings such stenographers shall receive a salary fixed by law, to be paid as the salaries of clerks in the surrogate's office are paid.

In the counties of Erie, Albany, Westchester, Monroe and Queens the salary of said stenographer shall be fixed by the board of supervisors, or by the board of estimate and apportionment, as the case may be, and the payment of such salary shall be provided for by such board in the same manner as other county salaries are paid.

§ 25, *Sur. Ct. A. Former § 2495, Code Civ. Pro.*

Stenographers in other counties.

The surrogate of each county, except New York, Kings, Bronx, Albany, Westchester, Hamilton, Queens, Richmond, Monroe and Erie, may in his discretion, appoint, and at pleasure remove, a stenographer for his court, who shall receive a salary to be fixed by such surrogate, not exceeding, in counties having a population less than thirty thousand, eight hundred dollars per annum; in counties having a population of thirty thousand or more, not exceeding twelve hundred dollars per annum, except that in Madison county or in counties in which are located cities of the second class, or in counties in which are located three cities of the third class, such salary shall not exceed eighteen hundred dollars per annum; and except that in Oneida county such salary shall not exceed twenty-seven hundred dollars per annum; and in any county wholly containing a city of the first class, such salaries shall not exceed two thousand dollars per annum. The population of the several counties shall be determined by the last preceding census. The board of supervisors shall provide for the payment of such salary in the same manner as other county salaries are paid. When not actually engaged in the discharge of his duties as stenographer, he shall perform such clerical duties in connection with the surrogate's court as the surrogate directs. In counties wherein the surrogate is also county judge, the stenographer so appointed shall be the stenographer of the county court, and shall perform the

duties pertaining to a stenographer of the county court without additional compensation, *except that in Broome county such stenographer shall receive an additional salary, to be fixed by the county judge, not exceeding twelve hundred dollars per annum.* In counties where, for any cause, a regular stenographer for his court has not been appointed, as provided by this section, the surrogate may, in individual proceedings requiring the services of a stenographer, appoint a stenographer who shall be paid a reasonable compensation, certified by the surrogate in every case in which he takes notes of testimony, from the estate or matter in which such services are rendered.

When the regular stenographer appointed under this or the last section is sick, absent, on his vacation, or unable to act for other good cause, the surrogate may designate a stenographer to act temporarily in his place, who shall be paid by the county a reasonable compensation certified by the surrogate.

§ 26, *Sur. Ct. A.* Former § 2496, *Code Civ. Pro.*

Duty of stenographer.

The stenographer of a surrogate's court must, under the direction of the surrogate, take full stenographic notes of all proceedings, in which oral proofs are given, except where the surrogate otherwise directs. The testimony must be legibly written out at length by him, from his notes when required by the surrogate; and the minutes thereof, as so written out, must, after being authenticated, as prescribed in the next section, be filed in the surrogate's office, and in all cases his stenographic books must be so filed and remain in the surrogate's office five years.

§ 27, *Sur. Ct. A.* Former § 2497, *Code Civ. Pro.*

How minutes of testimony authenticated and bound.

The minutes of testimony written out as prescribed in the last section, or taken by the surrogate, or under his direction, while the witness is testifying, must, before being filed, be authenticated by the signature of the stenographer, referee, the surrogate or the clerk of the surrogate's court, as the case may be, to the effect that they are correct.

The minutes of testimony written out by the stenographer must be bound, at the expense of the county, in volumes of convenient size and shape, indorsed "Stenographic minutes," and numbered consecutively.

§ 28, *Sur. Ct. A.* Former § 2498, *Code Civ. Pro.*

¶ 11 Fees of Clerks and Stenographers; Expenses of Surrogate and Clerk.

Fees for copying or recording papers.

The clerk of the surrogate's court may charge and receive to the use of the county the following fees, except that where the board of supervisors or board of aldermen have allowed him to receive fees for his own use the same may be received and retained by said clerk:

1. For furnishing a transcript of a decree to be filed in the county clerk's office, fifty cents.

2. For making a copy of the proceedings and evidence in any matter, six cents per folio.

3. For recording agreements settling estates or accounts, releases, assignments, or mortgages of, or liens upon, any interest in an estate or fund; wills probated in another county or state, and the papers required to be recorded therewith, ten cents for each folio.

4. For a certificate, other than a certificate that a paper, for the copying of which he is entitled to a fee, is a copy, twenty-five cents.

5. For making and certifying a copy of a will, or paper on file or recorded in such office, ten cents for each folio.

6. For comparing and certifying that a paper is a copy of a record or paper on file, twenty-five cents and five cents for each folio; and for comparing and certifying a case on appeal where printed copies thereof are presented by any party to any proceeding, one cent for each folio.

7. For recording the official bond or undertaking of an executor, administrator, guardian or trustee, ten cents a folio, except that where the clerk receives a salary as full compensation for his services no fee shall be charged for such recording.

The board of supervisors, or board of aldermen, may fix a different rate of compensation, and may require the clerk to keep an account of all such fees and make report thereof whenever requested by such board.

On the appointment of a guardian, if it appears that the application is made for the purpose of enabling the minor to receive bounty, arrears of pay or prize money, or pension due, or other dues or gratuity from the federal or state government, for the services of the parents or brother of such minor in the military or naval service of the United States, no fees shall be charged or received.

§ 29, *Sur. Ct. A.* Former § 2499, *Code Civ. Pro.*

New York county.

Fees of clerk of court of surrogate's court.

Except where a greater fee is allowed by another statute for the same service, the clerk of the court of the surrogate's court of the county of New York shall charge and receive for the use of the county, the following fees:

1. For furnishing a transcript of a decree to be filed in the county clerk's office, fifty cents.

2. For a certificate, other than a certificate that a paper, for the copying of which he is entitled to a fee, is a copy, twenty-five cents.

3. For making and certifying a copy of a will, or any paper on file, or recorded in his office, fifteen cents for each folio.

4. For comparing and certifying that a paper is a copy of a record or paper on file, ten cents for each folio, with a minimum fee of twenty-five cents; and for comparing and certifying a case on appeal where printed copies thereof are presented by any party to any proceeding, one cent for each folio.

5. For filing the official bond or undertaking of an executor, administrator, guardian, trustee, or other fiduciary, fifty cents.

6. For recording any instrument for which no fee is otherwise provided, ten cents for each folio.

7. For taxing a bill of costs, fifty cents.
 8. For issuing a certificate of notice of claims filed, fifty cents.
 9. For filing a petition whereby any proceeding is commenced, except a petition filed in connection with matters mentioned in subdivision thirteen hereof, one dollar.
 10. For sealing any paper when required, twenty-five cents.
 11. For issuing executions upon judgments, fifty cents.
 12. For searching for and certifying to any record in his office for which search is made, for each year the sum of fifteen cents for each record searched, except that he shall be entitled to a minimum fee of twenty-five cents for each search.
 13. For filing a will for probate, three dollars, and for recording or filing an exemplified copy of a foreign will, twenty cents per folio with a minimum charge of six dollars.
 14. On demanding a trial by jury in a proceeding other than a contested probate proceeding, six dollars.
 15. For filing a note of issue in a contested probate proceeding, three dollars.
 16. For producing papers, documents, books of record on file in his office under a subpoena duces tecum, if within the county where the public office is situated, fifty cents; if within any other county, one dollar additional for each day, or part thereof, the messenger is detailed from the office, in addition to mileage fees of eight cents per mile and the necessary expenses of messenger.
 17. Where, upon the application of any party, a clerk of the surrogate's court, goes to a place other than the surrogate's office, or the court room where the surrogate's court is regularly held, in order to take testimony, he shall be paid by such party his actual and necessary expenses.
 18. In any case where the gross estate is shown by affidavit not to exceed the sum of one thousand dollars, no fees shall be charged except for certificates, certified copies of papers, recording instruments other than wills, subpoenas, and the expenses provided by subdivision seventeen hereof.
- On the appointment of a guardian, if it appears that the application is made for the purpose of enabling a minor to receive bounty, arrears of pay or prize money, or pension due, or other dues or gratuity from the federal or state government, for the services of the parents or brother of such minor in the military or naval service of the United States, no fee shall be charged or received.

Same; acts repealed.

Sections six, seven, eight and nine of chapter five hundred and thirty of the laws of eighteen hundred and eighty-four, entitled "An act in relation to the office of surrogate of the county of New York," are hereby repealed.

Chap. 163, Laws 1921.

Fees of stenographer acting or taking testimony in surrogate's court.

A stenographer, appointed or acting pursuant to sections 26 and 27 of this act, may charge and receive a sum not exceeding six cents per folio for furnishing a copy of the minutes, proceedings and testimony taken in surrogate's court to any person who applies for the same.

Except where otherwise agreed, or when special provision is otherwise made by statute, a stenographer is entitled, for a copy fully written out from his stenographic notes of the testimony, required to be made in any proceeding for the record of the surrogates' court of the counties of New York, Bronx, Kings and Erie, ten cents for each folio; and the surrogate may order that the fees for such record copy be paid out of the estate to which the proceeding relates.

§ 30, *Sur. Ct. A.* Former §§ 2500 and 3311, *Code Civ. Pro. consolidated.*

Expenses of surrogate or clerk.

Where, upon the application of any party, the surrogate, or the clerk of the surrogate's court, goes to a place other than the surrogate's office, or the court room where surrogate's court is regularly held, in order to take testimony, he shall be paid by such party his actual and necessary expenses.

§ 31, *Sur. Ct. A.* Former § 2501, *Code Civ. Pro.*

It was held in construing a former provision (§ 2567) with reference to fees of the surrogate for holding court at a place other than his office that the fees mentioned in that section were not collectible from the county but from the individuals who asked such special service. *Townsend v. Board, etc.*, 73 Misc. Rep. 563.

The present section provides in terms that such expenses shall be paid by the party making the application.

¶ 12 Powers and Duties of Clerks of Surrogates' Courts.

Clerk and deputy clerk of surrogate's court; their powers.

The clerk and deputy clerk of the surrogate's court may severally exercise, concurrently with the surrogate, the following powers of the surrogate:

1. He may certify and sign as clerk of the court, or as deputy clerk of the court, as the case may be, any of the records of the court, and the records and papers specified in subdivision nine of section 20 of this act.

2. He may issue any citation, subpoena or other mandate to which a party is entitled as of course, either unconditionally or on the filing of any paper; and may sign, as clerk of the court, or as deputy clerk of the court, as the case may be, and affix the seal of the court to any letters or mandate issued from the court.

3. He may certify in the manner prescribed by law, a copy of any paper, required or permitted by law to be filed or recorded in the surrogate's office.

4. He may adjourn to a definite time, not exceeding thirty days, any matter, when the surrogate is absent from his office, or unable, by reason of other engagements, to attend to the same.

5. He may administer oaths, take affidavits and the proof and acknowledgment of deeds and all other instruments in writing and certify the same with

the same force and effect as if taken and certified by the county judge; and in any proceeding of which the court has jurisdiction, he may administer oaths, take affidavits, testimony and depositions, and certify the same at any place within the state of New York, with the same force and effect as if taken in his county.

6. The clerk of the surrogate's court of each of the counties of Kings, Bronx, Queens and New York may, with the approval of the surrogate or surrogates of his county, authorize or deputize one or more of the other clerks, employed in the surrogate's office of his county, to sign his name, and exercise such of the other powers conferred upon him by this section, as he shall designate. The surrogate may prohibit the clerk and deputy clerk, or either of them, from exercising any powers specified in this subdivision, but the prohibition does not affect the validity of any act of the clerk or deputy clerk done in disregard of the prohibition.

7. The clerk or deputy clerk or other person employed in any capacity in a surrogate's office, shall not act as appraiser, as attorney or counsel, or as referee, or special guardian, in any matter before the surrogate.

8. The clerk and deputy clerk of the surrogate's court, and in the counties of Kings and Queens, two other clerks, and in the counties of Bronx and Westchester, one other clerk, to be designated by the surrogate, in addition to the powers above enumerated may exercise, concurrently with the surrogate of the county, the power to take the proof of a will, unless demand be made for an oral examination or cross-examination of the subscribing witnesses, or objections to such probate are pending.

§ 32, *Sur. Ct. A.* Former § 2502, *Code Civ. Pro.*

Subd. 2. In many former sections the language used was "the surrogate shall issue a citation," and that language has now been changed to "a citation shall issue" thus avoiding the contention that the clerk could not issue a citation without a special order. The language has also been made broader here, so that the clerk will have ample power to issue all citations.

A citation is issued as of course by the clerk, and no order of the surrogate is necessary either prepared and submitted by attorneys or entered by the clerk. An order is necessary, however, whenever any other method of service is to be employed than direct personal service. *In re Mount*, 180 N. Y. Supp. 266.

Searching files and making certificate.

Subdivision 3 authorizes the clerk to make the certificate required to be made pursuant to § 22 Sur. Ct. A. when a search is made.

Clerk to keep court and trust fund register.

Whenever there shall be filed in the office of the surrogate any decree or order of the surrogate or of the surrogate's court directing the deposit of money, either actually in the hands of some person or persons or thereafter arising from the sale of real estate described in any such decree or order, with the county treasurer of his county, or with the chamberlain of the city of New York, or upon the filing in the said surrogate's office of any treasurer's or chamberlain's receipt stating that a sum of money has been deposited with such treasurer or chamberlain, in accordance with a decree or order of any such surrogate's court, the clerk of the surrogate's court shall enter in the court and trust fund register, the title of the proceeding, or the name of the estate in which such decree or order was made, together with a statement of the amount so deposited, or ordered to be deposited, if said decree or order contains the amount of same, and the name of the person or persons, if any, to whom said money is ordered to be paid, and the date of the filing of the same or of such receipt as herein mentioned.

§ 33, *Sur. Ct. A.* Former § 2503, *Code Civ. Pro.*

CHAPTER IV.

Surrogates' Courts and Their General Jurisdiction.

- ¶ 13. Surrogates' Courts are courts of record.
- § 34. Times and places of holding court.
- § 35. Proceedings when county judge is also surrogate.
- § 36. Terms of court in New York county and powers of surrogates.
- ¶ 14. § 40. General jurisdiction of surrogates' courts.
- § 228. Surrogate may direct as to custody of property where representatives disagree.
- ¶ 15. Reference by the surrogate, and powers and duties of referees.
- § 66. Reference in probate cases in New York county.
- ¶ 16. § 42. Jurisdiction of subject matter.
- § 43. Presumption of jurisdiction.
- § 44. Effect of exercise of jurisdiction.
- § 46. Concurrent jurisdiction.

¶ 13 Surrogates' Courts Are Courts of Record; Times and Places of Holding Court.

Surrogate's Court is a court of record; its powers and jurisdiction.

The Surrogate's Court is made a court of record by article 2, § 2, subdivision 7 of the Judiciary Law.

The Constitution of 1894 (Art. 6, § 15) provides: "Surrogates and Surrogates' Courts shall have the jurisdiction and powers which the surrogates and existing Surrogates' Courts now possess, until otherwise provided by the Legislature."

It has all the jurisdiction and powers derived from the rules and practice of the Court of Chancery, the Constitution of the State, and the statutory law.

It has been settled by repeated adjudication that the general equitable powers of a court of equity have not been conferred upon Surrogates' Courts and, therefore, no authority exists in those courts to exercise such powers. *Matter of Randall*, 152 N. Y. 508.

So far as it is necessary to discharge the duties and functions conferred upon him by statute and to make proper orders and decrees in matters of which he has jurisdiction the

surrogate has all powers, legal or equitable, necessary to accomplish that result. *Matter of U. S. Trust Co.*, 175 N. Y. 304; aff'g, 80 App. Div. 77.

For an exhaustive study of Surrogates' Courts, their history and jurisdiction, see *Brick's Estate*, 15 Abb. Pr. 12.

It is to be observed that the powers of the surrogates in the present organization of the State are judicial, administrative and inquisitorial. Every one of these powers is distinct. As a judicial officer the surrogate's jurisdiction, but not the mode of its exercise or the principles of its construction, is prescribed by statute. As an administrative officer the surrogate's powers and duties and the mode of their execution are wholly statutory. His inquisitorial power, very limited in extent, is also wholly statutory. The last power is not dissimilar to the former and highly responsible power of a notary or prothonotary. *Tucker v. Tucker*, 4 Keyes, 136; *Stilwell v. Carpenter*, 59 N. Y. 414, 2 Abb. N. C. 238, 268; *Matter of Meyer*, 72 Misc. Rep. 566, 131 N. Y. Supp. 27. Consult *Matter of Martin*, 80 Misc. Rep. 17, 141 N. Y. Supp. 784.

The Surrogate's Court, while it is now a constitutional court so far as concerns its existence, possesses only such jurisdiction as is conferred upon it by statute, and only such powers as are either expressly conferred upon it or are necessarily incident to the exercise of its statutory jurisdiction. *Bevan v. Cooper*, 72 N. Y. 317, 327; *Riggs v. Cragg*, 89 id. 479; *Matter of Bolton*, 159 id. 129, 134. Therefore, any one claiming title or authority under a decree of a Surrogate's Court must be prepared to show that the court had jurisdiction to make the decree (*Matter of Hawley*, 104 N. Y. 250, 262), and such a decree may always be attacked collaterally for lack of jurisdiction in the surrogate (*Taylor v. Syme*, 162 id. 513, 519).

By the revision of chapter XVIII of the Code of Civil Procedure made in 1914 the jurisdiction of the court was enlarged, not by including other matters within the jurisdiction, so much as by making the jurisdiction more full and

complete over those matters as to which it already had jurisdiction. To accomplish this the authority was given to surrogates to conduct trials by jury, the lack of which power had always been in the way of the exercise by the surrogate of a jurisdiction which enabled him to dispose of all matters necessary to be disposed of in order to make a complete decree in many proceedings.

General powers of courts of record.

A court of record has power:

1. To issue a subpoena, requiring the attendance of a person found in the state, to testify in a cause pending in that court; subject, however, to the limitations, prescribed by law, with respect to the portion of the state, in which the process of a local court of record may be served.

2. To administer an oath to a witness, in the exercise of the powers and duties of the court.

3. To devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.

§ 63, *Civ. Prac. A.* Formerly part of § 7, *Code Civ. Pro.*

When the Civil Practice Act was adopted, it provided as to the general jurisdiction of the courts then in existence as follows:

Each of those courts shall continue to exercise the jurisdiction and powers now vested in it by law, according to the course and practice of the court except as otherwise prescribed.

From § 62, *Civ. Prac. A.* Former § 4, *Code Civ. Pro.*

Surrogate's court; when to be opened; times and places of holding court.

The surrogate's court is always open for the transaction of any business within its powers and jurisdiction.

The surrogate may, from time to time, appoint, and may alter, the times and places of holding said court for the transaction of any business which may come before it. The surrogate may sign orders, decrees, letters testamentary, of administration and of guardianship, and approve bonds wherever he may be at any time.

§ 34, *Sur. Ct. A.* Former § 2504, *Code Civ. Pro.*

When and where court held by county judge who is also surrogate.

The surrogate's court in a county where the county judge is also surrogate, may be held at the time and place at which the county court is held; and the jury in attendance may constitute the jury for the trial of any issue arising in the surrogate's court.

§ 35, *Sur. Ct. A.* Former § 2505, *Code Civ. Pro.*

This section provides for a jury in cases where the surrogate is county judge and desires to hold the trial at a term of the county court. Where the surrogate is not county judge, or being such does not desire to hold the trial at a term of the county court, see § 68, ¶ 31.

Terms of surrogates' courts in New York county and powers of surrogates.

The surrogates of the county of New York, from time to time must appoint and may alter the times of holding terms of that court for the trial of probate proceedings and for the hearing of motions and other chamber business. They must prescribe the duration of such terms, and assign the surrogate to preside and attend at the terms so appointed. In case of the inability of a surrogate of that county to preside or attend, the other surrogate may preside or attend in his place. Two or more terms of the surrogate's court may be appointed to be held at the same time. The term of that court held at the chambers shall dispose of all business except contested probate proceedings; all contested probate proceedings shall be disposed of at the trial term. An appointment must be published in two newspapers published in the city of New York during or before the first week in January in each year. All the powers conferred by law upon the surrogate of the county of New York may be exercised by either of the surrogates of the said county. There shall be published in the official law paper published in said county, upon Monday of every week, under the name of the surrogate making the several appointments, a full and true list of the names of all appraisers, transfer tax appraisers, special guardians, referees and temporary administrators, whom either surrogate shall have designated or appointed during the preceding week together with the names of the proceedings in which they were appointed and the dates of said appointments.

§ 36, *Sur. Ct. A.* Former § 2506, *Code Civ. Pro.*

¶ 14 General Jurisdiction of Surrogates' Courts Specified.

General jurisdiction of surrogate's court.

Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

To administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily appears in such proceeding, or is brought in by supplemental citation, as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.

In addition to and without limitation or restriction on the foregoing powers, each surrogate or surrogate's court shall have power, in the cases and in the manner prescribed by statute:

1. To take the proof of wills; to admit wills to probate; and to take and revoke probate of heirship.

2. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.

3. To direct and control the conduct, and settle the accounts, of executors, administrators, and testamentary trustees; to remove testamentary trustees, and to appoint a successor in place of a testamentary trustee.

4. To enforce the payment of debts and legacies; the distribution of the estates of decedents; and the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate or fund.

5. To direct the disposition of real property, and interests in real property of decedents, and the disposition of the proceeds thereof.

6. To appoint and remove guardians for infants; to compel the payment and delivery by them of money or other property belonging to their wards; to direct and control their conduct, and settle their accounts.

7. To settle the accounts of a father, mother or other relative having the rights, powers and duties of a guardian in socage, and to compel the payment and delivery of money or other property belonging to the ward.

8. To determine the validity, construction or effect of any disposition of property contained in any will proved in his court, whenever a special proceeding is brought for that purpose, or whenever it is necessary to make such determination as to any will in a proceeding pending before him, or whenever any party to a proceeding for the probate of any will, who is interested thereunder, demands such determination in such proceeding.

§ 40, *Sur. Ct. A.* Former § 2510, *Code Civ. Pro.*

The statement as to general jurisdiction has been so enlarged in its scope as to give general jurisdiction as to all matters necessary to be determined to enable the surrogate to make a complete decree as between all the parties interested. It is not the enlargement of the jurisdiction, but the completion of it that has been sought.

Before the revision of 1914 the section ended with the words: "This jurisdiction must be exercised in the cases and in the manner prescribed by statute." Thus the whole section was limited to statutory jurisdiction. Now the general jurisdiction is not limited by those words, but they have in substance been inserted before subdivision 1, so that as to those particular matters the court must act as prescribed by statute, because those proceedings are not general but special.

Subdivision 8 has been added to give jurisdiction to con-

strue wills, not only in a proceeding where it is necessary to construe the will to make a decree, or in a proceeding for probate, but in an independent proceeding instituted for that purpose. Under the old practice, it was in many cases necessary to resort to an action to obtain a construction of a will. The resort to another court ought to be unnecessary, and often at some stage of the proceedings, the surrogate was confronted with a judgment construing the will in a way that the other judge would not have construed it if it had been possible for him to know all the facts relating thereto.

For proceeding to construe a will see § 145, ¶ 68.

The provision in a prior section of the Code of Civil Procedure section (2472a) for a jury trial, has been retained in section 68. That section was in effect only a short time, and did not do much more than to prepare the way for the still larger extension of jurisdiction to be found in the amendments of 1914. The leading cases which discussed that section were *Matter of Clyne*, 72 Misc. Rep. 593 and *Matter of Cary*, 77 id. 602.

Naturally this more complete and extensive jurisdiction has been much discussed in the courts, and in the main given effect, although perhaps not as fully as the revisers of 1914 hoped and expected.

Surrogate Ketcham of Kings County, the most prominent member of the Surrogates' Revision Commission, has given a very lucid interpretation of the scope of the extended jurisdiction granted by section 40. *In re Kenny*, 92 Misc. Rep. 330, 156 N. Y. Supp. 827, a bank had been made a party to a judicial settlement on an allegation that it held a fund belonging to the decedent. The bank moved to dismiss the proceeding as to it on the ground of lack of jurisdiction to make it a party. In the course of an opinion granting the motion, Surrogate Ketcham throws much light on the construction to be put upon section 40. The wide extent of the jurisdiction conferred by this section has been commented upon *In re Coombs*, 185 App. Div. 312; 173 N. Y. Supp. 58 as follows:

The language is so comprehensive that in association with section 211 it sweeps away all constraints upon the surrogate's jurisdiction, and the necessity of multiplying remedies in the distribution and transfer of a decedent's property to whomsoever it belongs or should be delivered. The policy of securing unity of administration of a decedent's estate should result in expedition and thrift, and demands varied and highly informed judicial capacities. The State has empowered surrogates in unmistakable language, and it is not the function of the courts to discover or to fashion reasons for thwarting the manifest policy.

Issues on accounting.

Where objections to an account were filed and it was claimed by the accounting party that the acts complained of had been ratified, it was held that the surrogate had jurisdiction to determine the question and should not dismiss the objections. *In re Brady*, 183 N. Y. Supp. 532, 111 Misc. Rep. 492.

The Surrogate's Court has not been given jurisdiction to set aside a general release given by the representative to another. *In re Mondshain*, 186 App. Div. 528; 174 N. Y. Supp. 599.

Equitable powers.

The equitable and other jurisdiction is to be exercised "in the cases and in the manner prescribed by statute." All general phrases in a statute yield to a particular specification contained in the same statute; hence the general equitable power must yield to the statutory restriction upon it or directions as to it, and where the statute prescribes when and how the surrogate will act, he cannot act otherwise than as prescribed. *In re Holzworth*, 166 App. Div. 150, 154, 151 N. Y. Supp. 1072, affirmed 215 N. Y. 700; *In re Doyle*, 180 App. Div. 398, 167 N. Y. Supp. 827.

This equitable power can not be exercised so as to make a

decision which is contrary to the express provisions of another section in the same chapter.

In *Matter of Holzworth*, 166 App. Div. 150, 151 N. Y. Supp. 1072, aff'd, 215 N. Y. 700, it was held that distribution of personal property in kind could not be made contrary to the provisions of section 2736 Code Civ. Pro. (Sur. Ct. A. § 268).

In *re Herman's Will*, 178 App. Div. 182, 165 N. Y. Supp. 298, aff'd, 222 N. Y. 564, it was held that the surrogate could not refuse to probate a will under section 2614 Code Civ. Pro. (§ 144 Sur. Ct. A.), because a prior joint will deprived the testatrix of the right to make a subsequent will.

The apparent unwillingness of the courts to extend the equitable powers of the surrogate's court where in any case they could so construe the statute that they were not compelled to grant such equitable power occasioned an amendment to section 40 in 1921 which is that part of the section beginning with "In addition to." The purpose of this amendment is to meet the objections of the court that equitable jurisdiction was not given in proceedings brought under the eight subdivisions which follow that language.

General jurisdiction in all transfer tax matters.

The surrogate seems to have been given general legal and equitable jurisdiction in all transfer tax matters, by an amendment to section 228 of the Tax Law adopted in 1920, as follows:

Jurisdiction of the surrogate.

The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction; and if two or more surrogates' courts shall be entitled to exercise any such jurisdiction, the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other surrogate. * * *

For proceedings under Transfer Tax Law see § 93.

Surrogate may direct as to custody, where co-executors, etc., disagree.

Where two or more co-executors or co-administrators disagree, respecting the custody of money or other property of the estate; or two or more testamentary trustees, or guardians of the property disagree, respecting the custody of money or other property, belonging to a fund or an estate which is committed to their joint charge; the surrogate may, upon the petition of either of them, or of a creditor or person interested in the estate, and proof, by affidavit, of the facts, make an order, requiring them to show cause, why the surrogate should not give directions in the premises. Upon the return of the order, the surrogate may, in his discretion make an order, directing that any property of the estate or fund be deposited in a safe place, in the joint custody of the executors, administrators, guardians, or testamentary trustees, as the case requires, or subject to their joint order; or that the money of the estate be deposited in a specified safe bank or trust company, to their joint credit, and to be drawn out upon their joint order. § 228, *Sur. Ct. A. Former* § 2698, *Code Civ. Pro.*

The surrogate has no power to compel the delivery by the executor of letters and papers having no value. *Thompson v. Mott*, 5 Redf. 574, 1 Dem. 32.

The section applied.

The application should be by petition, upon which an order to show cause will issue to the respondents.

Where co-executor claims entire estate and has brought an action to enforce such claim, deposit of property of estate will be directed. *Matter of Keller*, 1 Dem. 577.

Where the will gives the executrix the use of a fund with the right to use the principal as she may need it, and joins an executor with her, an order for joint control will not be made. *Matter of Trelease*, 115 App. Div. 654, 100 N. Y. Supp. 1051.

The Surrogate's Court has no power on application for revocation of letters to direct the deposit of money or property in a trust company or bank. *Matter of Underhill*, 1 Dem. 302.

Dispute between executors as to right of manual possession of securities and court refused under facts of that case to direct their deposit in a bank. *Burt v. Burt*, 41 N. Y. 46; *Wood v. Brown*, 34 id. 337.

Discretion of surrogate in ordering deposit of money upheld. *Matter of Hoagland*, 51 App. Div. 347, 64 N. Y. Supp. 920; aff'd, 164 N. Y. 573.

The surrogate may make an order allowing an executor free access to and inspection of the books and papers of the deceased. *Matter of Stein*, 33 Misc. Rep. 542, 68 N. Y. Supp. 933.

Appeal.

The exercise of discretion will not be interfered with unless it is apparent that such discretion has been abused. *Matter of Adler*, 60 Hun, 481, 39 N. Y. St. Repr. 462, 15 N. Y. Supp. 227.

¶ 15 Surrogate May Refer Certain Questions; Powers and Duties of Referee.

Surrogate may refer questions of fact.

In a special proceeding other than one instituted for probate of a will, and subject to the right of trial by jury of any question of fact, the surrogate may, in his discretion, appoint a referee to take and report to the surrogate the evidence upon the facts, or upon a specific question of fact; to examine an account rendered; to hear and determine all questions, arising upon the settlement of such an account, which the surrogate has power to determine; and to make a report thereon, subject, however, to confirmation or modification by the surrogate. But no referee to examine an account rendered, whether intermediate or final, or to hear and determine all questions arising upon the settlement of such an account, shall be appointed, where the estate or fund does not exceed one thousand dollars in value, or in any case where the item or items in such account to which objections have been made do not aggregate more than two hundred dollars. Such a referee has the same power, and is entitled to the same compensation as a referee appointed by the supreme court for the trial of an issue of fact in an action; and the provisions of law, applicable to a reference by the supreme court, apply to a reference made as prescribed in this section, so far as they can be applied in substance without regard to the form of proceeding. The surrogate of the county of New York may, on the written consent of all parties appearing in a probate case, appoint a referee, or may, in his discretion, direct an assistant to take and report the testimony, but without authority to pass upon the issues involved therein. Unless a referee's report is passed upon and confirmed, approved, modified or rejected by a surrogate within ninety days after it has been submitted to him, it shall be deemed to have been confirmed as of course and a decree to that effect may be entered by any party interested in the proceeding upon two days' notice.

§ 66, *Sur. Ct. A. Former § 2536, Code Civ. Pro.*

The amendment allows the appointment of a referee only in those cases where a party has no right to trial by jury, or waives such right. Therefore, where such trial by jury is not demanded the surrogate may appoint a referee in any case, except in a probate proceeding. This, of course, includes the trial of a contested claim.

In New York county assistant may take testimony.

There is no doubt about the authority of the surrogate, under this section, to authorize an assistant in New York county to take testimony in a contested probate of persons who are not witnesses to the will. *In re Gillender's Estate*, 98 Misc. Rep. 521; 162 N. Y. Supp. 955.

Section 66 analyzed.

In a special proceeding other than one instituted for probate of a will, the surrogate may in his discretion appoint a referee:

a. To take and report to the surrogate the evidence upon the facts;

b. Or upon a specific question of fact;

c. To examine an account rendered; *except* where the estate or fund does not exceed \$1,000 in value, or in any case where the item or items to which objections have been made do not aggregate more than \$200.

d. To hear and determine all questions arising upon the settlement of such account which the surrogate has power to determine;

e. To make a report thereon.

f. Such referee has the same power and is entitled to the same compensation as a referee appointed by the Supreme Court for the trial of an issue of fact in an action; and the provisions of law which apply to a reference by the Supreme Court apply to a reference ordered by the surrogate so far as they can be applied in substance without regard to the form of the proceeding.

g. The report must be confirmed or may be modified by the surrogate. Unless such report is passed upon and confirmed,

approved, modified, or rejected by the surrogate within ninety days after it has been submitted to him it shall be deemed to have been confirmed as of course and a decree to that effect may be entered by any party interested in the proceeding upon two days' notice.

In New York county.

h. A surrogate of New York county may refer a probate case on the written consent of all the parties appearing or he may in his discretion direct an assistant to take and report the testimony but without authority to pass upon the issues involved therein.

Reference to take testimony in probate proceeding.

By section 74, ¶ 32, as revised, a referee to take testimony of the subscribing, or any other material, witnesses who are in another county, and can not attend before him, may be appointed, and such evidence shall be treated as if taken by commission.

References generally.

The surrogate may appoint a referee to hear a question of fact as to residence of the deceased in proceedings to assess a transfer tax. *Matter of Bishop*, 111 App. Div. 545; app. dism., 188 N. Y. 635.

The surrogate may appoint a referee to state the facts with his opinion on hearing to dispose of real estate and he may rule upon such questions as may be presented. *Matter of Walker*, 43 Misc. Rep. 475, 89 N. Y. Supp. 459.

A reference may be ordered of an account and objections. *Matter of Gorman*, 49 App. Div. 637, 63 N. Y. Supp. 123.

Notice of appointment.

The surrogate may appoint a referee of his own motion without notice to any party. *Matter of Wood*, 34 Misc. Rep. 209, 69 N. Y. Supp. 491.

Fees of referee and stenographer. See ¶ 11.

It is true that all the parties to an action (and the same rule applies to a special proceeding) are liable for the fees of a referee, even including those parties, if any, who objected to the appointment of a referee. *Russell v. Lyth*, 66 App. Div. 290, 72 N. Y. Supp. 615. The same rule applies to the fees of an unofficial stenographer employed with the consent and acquiescence of the parties. *Bottome v. Alberst*, 47 Misc. Rep. 665, 94 N. Y. Supp. 348. And an attorney has power to bind his client for the payment of stenographer's and referee's fees, and a client is responsible for stenographer's fees in a case where the stenographer is employed by his attorney to take the minutes of proceedings before a referee appointed by a surrogate. *Harry v. Hilton*, 11 Abb. N. C. 448, 64 How. Pr. 199. Also, see *Keeler v. Bell*, 48 Misc. Rep. 428, 95 N. Y. Supp. 841, 17 Ann. Cas. 53, and cases cited; *Bottome v. Neely*, 54 Misc. Rep. 258, 104 N. Y. Supp. 429; aff'd, 124 App. Div. 600, 109 N. Y. Supp. 120; aff'd, 194 N. Y. 575.

Power of Surrogate's Court to require a party to pay the referee his fees and take up his report can be exercised only when the party so required is the representative of the estate. *Matter of Hurd*, 6 Misc. Rep. 171, 26 N. Y. Supp. 893, 31 Abb. N. C. 109; *Matter of Maritch*, 29 Misc. Rep. 270, 61 N. Y. Supp. 237.

An order made by the surrogate directing an executor to take up a referee's report and to pay the fees of the referee and stenographer, reversed, where the report had not been filed and the fees taxed. An administrator may be charged personally with the fees of an auditor appointed to examine his accounts. *Dunford v. Weaver*, 84 N. Y. 445; *Matter of Dunn*, 149 N. Y. Supp. 530, 164 App. Div. 134.

The power of the court to require a party to pay the referee his fees and take up his report can be exercised only where the party so required is the representative of the estate. *Matter of Hurd*, 6 Misc. Rep. 171, 26 N. Y. Supp. 893; *Matter of Maritch*, 29 Misc. Rep. 270, 61 N. Y. Supp. 237. As to who

ultimately is to be charged with the referee's fee is determined by the decree to be entered in the proceeding. N. Y. Co. Sur., Dec., 1912, page 1024, *In Re Luigi Manfredi*.

Appeal from order.

An order appointing a referee is not appealable. *Matter of Pearsall*, 21 N. Y. St. Repr. 305, 4 N. Y. Supp. 365.

Power of referee.

The referee has no power to grant an amendment which withdraws several items of the account. *Eldred v. Eames*, 115 N. Y. 401, revg. 48 Hun, 253.

Upon a reference an affirmative judgment cannot be rendered against the claimant upon a counterclaim in favor of the executors. *Mowry v. Peēt*, 88 N. Y. 453.

The referee may allow an amendment increasing the claim. *Lounsbury v. Sherwood*, 53 App. Div. 318, 65 N. Y. Supp. 676.

Report and findings. See ¶ 167.

Section 467 Civ. Pr. A. provides that the court may, wherever it is necessary for its information, order the referee to take proof and report to the court his opinion thereon. The provisions of section 471 Civ. Pr. A., with relation to findings, do not apply to a reference which is merely to take proof and report, as provided in section 467. *Matter of Sprathoff*, 50 Misc. Rep. 109; aff'd, 112 App. Div. 918; *Matter of Robinson*, 53 Misc. Rep. 177.

Reference — Findings.

A referee acting in Surrogate's Court is not relieved from making findings as required by section 471 Civ. Prac. A., by the provisions of section 71 Sur. Ct. A., applying to decisions by surrogate. *In re Troughton*, 101 Misc. Rep. 386, 166 N. Y. Supp. 1076. But see *In re Carpenter*, 178 App. Div. 165, 165 N. Y. Supp. 10.

Where there has been a reference to hear and determine, and the surrogate modifies the report, there is no need to have

separate findings by the surrogate or a new set of exceptions. *Matter of Yetter*, 44 App. Div. 404, 61 N. Y. Supp. 175; aff'd, 162 N. Y. 615.

A surrogate may send a case back to the referee to take further evidence and report. *Matter of Schroeder*, 113 App. Div. 204, 99 N. Y. Supp. 176; aff'd, 186 N. Y. 537.

Referees should conform to the provision for separately stating and numbering findings of fact and conclusions of law. *Matter of Schroeder*, 113 App. Div. 221, 99 N. Y. Supp. 732.

Findings will enable a party aggrieved to determine the points upon which he wishes to appeal. *Matter of U. S. v. Leary*, 138 App. Div. 857, 123 N. Y. Supp. 289.

Report should be delivered within sixty days.

Section 470 Civil Practice Act concerning reports of referees requires that where there is a reference for the trial of an issue of fact or law, or for a compulsory reference for information of the court under section 467, the report must be filed or delivered within sixty days.

Duty of surrogate on coming in of referee's report.

In reviewing the exceptions to a report of a referee appointed under section 66 Sur. Ct. A., to hear and determine the matters so referred, the surrogate's jurisdiction is in the nature of that possessed by a court of review or appeal; and the surrogate himself is not called upon to make any additional or independent findings, upon his sentence, or disposition, whatever it may be, of the questions or issues so referred and embraced in the report of such a referee. *Matter of Yetter*, 44 App. Div. 404; aff'd, 162 N. Y. 615; *Matter of McAleenan*, 53 App. Div. 193, 65 N. Y. Supp. 907; *Matter of Bettman*, 65 App. Div. 229, 72 N. Y. Supp. 728; *Matter of Niles*, 47 Hun, 348, 14 N. Y. St. Repr. 538; *Matter of Mellen*, 56 Hun, 553, 9 N. Y. Supp. 929, 31 N. Y. St. Repr. 770; *Matter of Nestell*, 72 Misc. Rep. 331, 131 N. Y. Supp. 193; aff'd 146 App. Div. 940, 131 N. Y. Supp. 113.

Surrogate may act after ninety days.

Unless a party interested avails himself of the limitation of the statute a surrogate may reject or modify the report after the expiration of ninety days. *Matter of Clark*, 168 N. Y. 427; *Matter of Barefield*, 177 id. 387; *Matter of Hoffman*, 136 App. Div. 516, 121 N. Y. Supp. 184.

The report may be returned for further hearing upon points unnoticed. *Matter of Bayer*, 54 Hun, 189, 26 N. Y. St. Repr. 803, 7 N. Y. Supp. 566.

¶ 16 Jurisdiction of Subject Matter of Proceeding, and Effect of Its Exercise to Give Jurisdiction in a Particular County.

Jurisdiction of subject-matter; objection to defect in record.

The surrogate's court obtains jurisdiction in every case to make a decree or other determination by the existence of the jurisdictional facts prescribed by statute. When the decree or other determination fails to recite the existence or proof of a jurisdictional fact, and such fact actually existed; or when any party has failed to take any intermediate proceeding required by law to be taken, an objection to such decree or determination based thereon is available only upon appeal, and the surrogate's court may, in its discretion, allow such a defect to be supplied by amendment.

§ 42, *Sur. Ct. A.* Former § 2512, *Code Civ. Pro.*

The petition.

A petition alleging all jurisdictional facts gives the court jurisdiction to entertain the proceedings and to adjudicate without further proof in case the facts alleged in the petition are not controverted. *Prout v. McNab*, 6 Dem. 152; *Matter of Zerega*, 58 Hun, 505, 12 N. Y. Supp. 497, 35 N. Y. St. Repr. 558. See ¶ 32.

Variance between original papers and copy served.

Where the copy citation served varies from the original, if the party appears the defect may be cured by amendment. *Pryer v. Clapp*, 1 Dem. 387.

Review by appeal.

On appeal it is not necessary that the record offered from a court of limited jurisdiction should show affirmatively and on its face that there was proof of all the jurisdictional facts. *Van Deusen v. Sweet*, 51 N. Y. 378.

Where the surrogate has jurisdiction of the subject matter and has acquired jurisdiction of the parties, his proceedings thereafter and the determination which he makes can be reviewed only upon appeal. *Harrison v. Clark*, 87 N. Y. 572; affg. 20 Hun, 404.

Presumption of jurisdiction.

Where the jurisdiction of a surrogate's court to make, a decree or other determination, is drawn in question collaterally, the jurisdiction is presumptively, and, in the absence of fraud or collusion, conclusively, established, by an allegation of the jurisdictional facts, contained in a written petition or answer, duly verified, used in the surrogate's court. The fact that jurisdiction of the parties was obtained is presumptively proved, by a recital to that effect in the decree.

§ 43, *Sur. Ct. A.* Former § 2513, *Code Civ. Pro.*

The section applied.

Where a surrogate of a county admits a will to probate, he must necessarily have passed upon the jurisdictional facts, and his jurisdiction cannot be passed upon by another surrogate. *Matter of Harvey*, 3 Redf. 214.

The bringing of a watch and chain of deceased into this State in order to appoint an administrator to sue a railroad for negligence was held to be a fraud upon our courts and to entitle the railway company to attack the letters collaterally. *Hoes v. N. Y., N. H. & H. R. R. Co.*, 173 N. Y. 435.

Where a person is duly appointed administratrix of the same estate of which a public administrator had been appointed, his appointment cannot be called in question collaterally. *Power v. Speckman*, 126 N. Y. 354.

Nor where the person alleged to have died intestate was in fact living. *Roderigas v. East R. S. I.*, 63 N. Y. 460; *O'Connor v. Higgins*, 113 id. 511.

Nor where there had been no citation to the widow or renunciation by her. *Kelly v. West*, 80 N. Y. 139.

Nor where the cause of action arose under the statutes of another State. *Leonard v. Columbia S. N. Co.*, 84 N. Y. 48.

A recital in a surrogate's decree in real estate proceedings of due service of citation upon all parties is presumptive proof of such service, when collaterally attacked. *Mott v. Fort Edward W. W. Co.*, 79 App. Div. 179, 79 N. Y. Supp. 1100. *Smith v. Blood*, 106 App. Div. 322, 94 N. Y. Supp. 667.

Concurrent jurisdiction of two or more surrogates.

Where personal property of the decedent is within, or comes into, two or more counties, under the circumstances specified in subdivision three of the last section; or real property of the decedent is situated in two or more counties, under the circumstances specified in subdivision four of the last section; the surrogates' courts of those counties have concurrent jurisdiction, exclusive of every other surrogate's court, to take the proof of the will and grant letters testamentary thereupon, or to grant letters of administration, as the case requires. But where a petition for probate of a will, or for letters of administration, has been duly filed in either of the courts so possessing concurrent jurisdiction the jurisdiction of that court excludes that of the other.

§ 46, *Sur. Ct. A.* Former § 2516, *Code Civ. Pro.*

Where there is concurrent jurisdiction, the particular court which first exercises jurisdiction may continue to so exercise it, until an application has been made to that court and a determination made as to which court has the real jurisdiction.

The practice is to raise the issue of jurisdiction in the court which has assumed it, and that court has the right to determine the preliminary question.

Effect of exercise of jurisdiction.

Jurisdiction, once duly exercised over any matter by a surrogate's court, excludes the subsequent exercise of jurisdiction by another surrogate's court, over the same matter, and all its incidents, except as otherwise specially prescribed by law. Where a guardian has been duly appointed by, or letters testamentary or of administration have been duly issued from, or any other special proceeding has been duly commenced in, a surrogate's court having jurisdiction, all further proceedings to be taken in a surrogate's court, with respect to the same estate or matter, must be taken in the same court.

§ 44, *Sur. Ct. A.* Former § 2514, *Code Civ. Pro.*

But where a petition for probate of a will, or for letters of administration, has been duly filed in either of the courts so possessing concurrent jurisdiction, the jurisdiction of that court excludes that of the other.

From § 46, Sur. Ct. A.

This section often applies in the case of guardianship, since an infant may change his place of abode, and an application for a new guardian, made necessary by death or resignation of the guardian, might improperly be made to the surrogate of the county in which the infant then is sojourning. It is required that such application be made to the surrogate of original jurisdiction. See ¶ 100.

Claim of jurisdiction in two counties.

Where application for probate or administration is made in two different counties alleging in each that the deceased was a resident of the county, the surrogate to whom the first application was made acquires jurisdiction of the estate, and he should determine as a preliminary question whether or not the deceased was a resident of his county. The surrogate of the county in which the later application was made should adjourn the proceeding before him when the pendency of the other proceeding is brought to his attention, in order that the parties may litigate the question of residence before the surrogate who first acquired jurisdiction to determine it.

The parties will then produce their proof and the surrogate will determine whether or not he has jurisdiction; if he decides that he has, the proceeding in the other court should be dismissed; if he decides that he has not, he will dismiss the proceeding before him or revoke any letters which he has granted, and the proceedings in the other court will be continued. *Matter of Gould*, 30 N. Y. St. Repr. 949, 9 N. Y. Supp. 600; aff'd, 131 N. Y. 630.

It is proper practice for the surrogate to make an order adjourning the later proceeding until the determination of the question of residence in the prior proceeding, and to include in the order a provision that in case the surrogate having

prior jurisdiction should decide that the deceased was a resident of his county, then the proceeding before him should be dismissed. *Matter of Reed*, 168 N. Y. Supp. 735.

A petition filed with the surrogate followed by a service of a citation upon one or more of the parties gives that court jurisdiction to try the question of residence, of which jurisdiction that court cannot be deprived by subsequent proceedings in the Surrogate's Court of another county. *Bumstead v. Read*, 31 Barb. 661; *People v. Waldron*, 52 How. 221.

Where it appears that the surrogate of another county had exercised jurisdiction of the estate, no other surrogate should attempt to do any act regarding the estate until the proceeding taken in the other court is set aside.

Order. Appeal.

An order made on the application effects a substantial right and is appealable. *Matter of Buckley*, 41 Hun, 106, 2 N. Y. St. Repr. 673.

CHAPTER V.

Surrogates' Courts and Their General Jurisdiction, Continued.

- ¶ 17. § 45. Exclusive jurisdiction.
Proof of death.
- ¶ 18. Proof of residence or domicile in the county.
- ¶ 19. Proof of location of property or debts in the county.
- § 47. Jurisdiction affected by locality of debts.
- ¶ 20. § 41. Jurisdiction of persons.
- ¶ 21. Substitution of attorneys.
Enforcing attorney's lien.
- ¶ 22. Commitment of insane persons.
Adoption of minors.
Relief under laws relating to the support of the poor.
- ¶ 23. Jurisdiction to determine questions regarding marriage, divorce, legitimacy of children, the relationship of parties, and whether they are alive or dead.

¶ 17 Exclusive Jurisdiction; Proof or Presumption of Death.

Exclusive jurisdiction.

The surrogate's court of each county has jurisdiction, exclusive of every other surrogate's court, to take the proof of a will, and to grant letters testamentary thereupon, or to grant letters of administration, as the case requires, in either of the following cases:

1. Where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere.
2. Where the decedent, not being a resident of the state, died within that county, leaving personal property within the state, or leaving personal property which has, since his death, come into the state, and remains unadministered.
3. Where the decedent, not being a resident of the state, died without the state, leaving personal property within that county, and no other; or leaving personal property which has since his death, come into that county, and no other, and remains unadministered.
4. Where the decedent was not, at the time of his death, a resident of the state, and a petition for probate of his will, or for a grant of letters of administration, under subdivision two or three of this section, has not been filed in any surrogate's court; but real property of the decedent, to which the will relates, or which is subject to disposition under article thirteen of this act, is situated within that county, and no other.

§ 45, *Sur. Ct. A.* Former § 2515, *Code Civ. Pro.*

Determination of the question of jurisdiction is always preliminary.

The statements of jurisdictional facts when properly set out in the petition justify the exercise of jurisdiction when such statements are not challenged, but, if an issue is raised as to any of such jurisdictional matters, it becomes the duty of the surrogate to immediately try such an issue. Having determined such question, the petition is either dismissed or the proceeding continued.

Petition prima facie evidence. See § 76, ¶ 32.

The surrogate may regard the oath taken to the petition as sufficient *prima facie* evidence of the jurisdictional facts therein alleged. If no issue as to such facts be raised the surrogate effectually decides that such facts are true and that decision gives him jurisdiction. *Bolton v. Schriever*, 135 N. Y. 65; *Van Gaasbeek v. Staples*, 85 App. Div. 271, 83 N. Y. Supp. 225.

Proof of death of intestate.

The fact of the death of the person upon whose estate letters of administration are applied for is of the first importance as a test of jurisdiction.

Where there is an absolute statement of death in the petition, no other proof is necessary in the absence of a denial of such allegation. (§ 76, ¶ 32.)

But such a statement made upon information and belief, should be supplemented with further proof.

The surrogate, upon an application for letters of administration, must judicially determine, upon the evidence submitted to him, whether or not the persons upon whose estate the letters are sought is dead. The determination must be supported by evidence; and, in the absence of direct and positive proof of death, facts and circumstances must be shown that lead to that conclusion. Great care should be taken to set forth every circumstance which would raise an inference of death, since, in a case where the fact of death does not ac-

tually exist, the letters cannot be sustained against collateral attack, unless due proof of death is adduced before the surrogate. It is quite impossible to give any standard by which to measure the sufficiency of circumstantial evidence of death; but mere information and belief, founded on nothing, is of course not proof in any legal sense. *Roderigas v. East River Savings Institution*, 76 N. Y. 316; *Matter of Killan*, 172 id. 547; *Scott v. McNeal*, 154 U. S. 34; *Matter of Sanford*, 100 App. Div. 479, 91 N. Y. Supp. 706; *Czech v. Bean*, 35 Misc. Rep. 729, 72 N. Y. Supp. 402; *Matter of Morgan*, 30 Misc. Rep. 578, 63 N. Y. Supp. 1078; *Matter of Norton*, N. Y. L. J., July 12, 1891; *Matter of Jones*, 70 Misc. Rep. 154, 128 N. Y. Supp. 477.

The surrogate must determine that the alleged deceased person is dead upon sufficient evidence and upon more evidence than an allegation upon information and belief. If he fails to so determine the question the letters issued are without jurisdiction. *Roderigas v. East R. Saving Inst.*, 76 N. Y. 316. See also 63 N. Y. 460, which was overruled by *Scott v. McNeal*, 154 U. S. 34.

Where the surrogate has tried the question of the fact of death and found the fact upon sufficient evidence, letters issued are valid until revoked and such letters will protect innocent parties acting upon the faith of them.

Burden of proof.

Where the allegation of death is controverted, the burden is upon the petitioner to prove such death and general repute of death is not sufficient. *Prout v. McNab*, 6 Dem. 152.

Proof by grant of temporary letters.

Temporary administration granted in New Jersey under their special statute regarding estates of absentees is no proof of death in this State and the payment of a bank deposit in this State to such administrator is no protection to the bank, in a case where the depositor was a resident of this State.

Marks v. Em. Ind. S. B., 122 App. Div. 661, 107 N. Y. Supp. 491.

Power to declare a person presumptively dead.

After a long period of absence the law in some instances creates a presumptive death. Upon application for letters of administration or for proof of a will, where this presumption is invoked, the surrogate has power to determine whether or not the presumption should prevail.

Where an estate is to be distributed to next of kin or legatees, the surrogate may direct the payment of the share or legacy of the absent person into the county treasury, or in a proper case, if the facts justify such a conclusion, he may declare the presumptive death of such beneficiary and direct payment to the personal representative to be appointed.

Presumption of death after an absence of seven years or more.

Presumption of death after seven years absence has been made effective by Surrogates' Courts in proceedings had there regarding the administration of estates as seen by the many decisions upon the subject. These decisions were based, in part, upon former section 841 Code Civ. Pro. where it was provided that there was a presumption of death of a person who absented himself for more than seven years in those cases where a life estate in real property depended upon the life of such a person.

By chapter 318 L. 1918, section 841 was amended so that in terms it gave authority to the decisions already made, and probably will make less proof of facts tending to strengthen the presumption necessary. The amended provision is now found in section 341 Civ. Pr. A.

Presumption of death in certain cases.

A person possessed of personal property in this state or upon whose life an estate in real property depends, who remains without the United States, or absents himself in the state or elsewhere for seven years together, is presumed to be dead in an action or special proceeding concerning such property or the administration of the estate of such person, unless it is affirmatively proved that he was alive within that time.

From § 341, Civ. Prac. A. From former § 841, Code Civ. Pro.

The rules applicable to unexplained disappearances have no relation to a disappearance in the face of fatal danger. Where one has vanished from the view of his associates without any intimation of the reason or manner of his departure, it is held that there is no presumption of death sufficient alone to constrain a finding. *Matter of Board of Education of New York*, 173 N. Y. 321; *Dunn v. Travis*, 56 App. Div. 317, 67 N. Y. Supp. 743.

But where testator was last seen under such circumstances that he was threatened by an immediate fatal danger, such facts may create a presumption of death. *Matter of Miller*, 67 Misc. Rep. 660, 124 N. Y. Supp. 825.

No presumption of a person's death arises from the fact that such person, having abandoned his original place of residence in this State for the purpose of acquiring a new residence in some other State, has not been heard of for more than seven years at his original place of residence. The absence, without being heard from for several years, which will warrant the presumption that a person is dead, means absence from that person's place of residence—his home—with which place he would most certainly keep up some kind of communication, or to which he would return were he alive; hence, if he has been absent therefrom for seven years without having been heard of, it may naturally enough be presumed that he is dead, but no such inference can be drawn from the fact that he has been absent from, and has not been heard of at, a place which was not or had ceased to be his home or place of residence. The reason on which the presumption is founded in the former do not exist in the latter case, and consequently the presumption itself does not exist in such a case. *McCartee v. Camel*, 1 Barb. Ch. 455-463; *Keller v. Stuck*, 4 Redf. 294, 298.

When presumption effective.

Where persons disappear without any supposition other than the word that they intend to commit suicide, the pre-

sumption is that after the expiration of seven years they are dead. *Eagle v. Emmet*, 4 Bradf. 117

And while the court under special circumstances could specifically decree the death to have happened at some intermediate period (*Allen v. Ketcham*, 24 N. Y. St. Repr. 251) yet in the absence of any such determination the time of death will ordinarily date from the decree adjudging the party dead. *Matter of Losee*, 119 App. Div. 107, 94 N. Y. Supp. 1082.

It is the presumption of law that the person lives until the expiration of seven years from the time he was last heard from. *Dunn v. Travis*, 56 App. Div. 317, 67 N. Y. Supp. 743; *Matter of Davenport (Herr Est.)*, 37 Misc. Rep. 455, 75 N. Y. Supp. 934; *Matter of Sullivan (Tobin Est.)*, 51 Hun, 378, 20 N. Y. St. Repr. 911.

The law applied.

Proof of death of a person once living is on the party who asserts it. *O'Gara v. Eisenlohr*, 38 N. Y. 296.

Presumption followed after seven years from last letter to wife. *Morrow v. McMahon*, 35 Misc. Rep. 348, 71 N. Y. Supp. 961.

A person having a prior right to letters who has been unheard of for thirty-four years will be presumed to be dead. *Matter of Barr*, 38 Misc. Rep. 355, 77 N. Y. Supp. 935.

Where the wife leaves the husband and cohabits with another, there is no presumption that the husband is dead after the lapse of five years. *Machini v. Zanoni*, 5 Redf. 492.

Letters of administration held to be properly granted where there was evidence by petition and affidavit of an absence of more than seven years with facts tending to show that there was no good reason for the absence. *Ruoff v. Greenpoint, S. B.*, 40 Misc. Rep. 549, 82 N. Y. Supp. 881.

In the cases where death is presumed from absence before the expiration of seven years, facts are proved which point to an earlier death as a fact. *Matter of Ketcham's Estate*, 5 N. Y. Supp. 566; *Matter of Ackerman*, 2 Redf. 521; *Sheldon v.*

Ferris, 45 Barb. 124; *Oppenheim v. Wolf*, 3 Sandf. Ch. 571; *Gerry v. Post*, 13 How. Pr. 118; *Merritt v. Thompson*, 1 Hilt. 550; *King v. Paddock*, 18 Johns. 141; *McCartee v. Camel*, 1 Barb. Ch. 455.

After an absence of ten years a husband will be presumed to be dead, on an application by the alleged widow of a man she subsequently married, for letters on the estate of the deceased second husband. *Nesbit v. Nesbit*, 3 Dem. 329.

Inquiry necessary.

Where a person has removed to another place to make a home, the fact that he has not been heard of for more than fourteen years at his original place of residence does not furnish presumption of death. *Keller v. Stuck*, 4 Redf. 294.

Distribution made of interest of persons who had not been heard from in eighteen years after effort made to find them. *Matter of Sullivan (Tobin Est.)*, 51 Hun, 378, 20 N. Y. St. Repr. 911, 4 N. Y. Supp. 59; *Matter of Wagener*, 143 App. Div. 286, 128 N. Y. Supp. 164.

Where a young man left a whaling ship in a foreign port and has not been heard from for thirty years, no special effort having been made to find him, his death will not be presumed. *Dunn v. Travis*, 56 App. Div. 317, 67 N. Y. Supp. 743.

Presumption of death without issue.

Where when last seen the person was unmarried and childless the presumption is that he continued so. *Matter of Matthews*, 75 Misc. Rep. 449, 136 N. Y. Supp. 636, 47 N. Y. Law J. 786.

The presumption that the person died without issue will be sustained by very slight proof. *Matter of Sullivan (Tobin Est.)*, 51 Hun, 378, 20 N. Y. St. Repr. 911, 4 N. Y. Supp. 59.

Should be determined in a proceeding.

Death arising from presumption should not be determined collaterally, but in a proceeding in which the fact of death is

an issue, such as on an application for letters of administration or for probate of a will. *Matter of Matthews*, 75 Misc. Rep. 449, 136 N. Y. Supp. 636, 47 N. Y. Law J. 785; *Matter of Smith*, 77 Misc. Rep. 76, 136 N. Y. Supp. 825.

Presumption of death; partition; life tenant.

See § 1065, Civ. Prac. A.

See also § 1066, Civ. Prac. A., for proceedings to distribute share of unknown owners in partition action.

Title is not "first class" which depends for validity upon the presumption of death of an owner who left home at twenty-four years of age, was in poor health, and had not been heard from at time of trial, about twenty years. Opinion states that there is no case where the presumption has prevailed until an absence of forty years. *Vought v. Williams*, 120 N. Y. 253.

To same effect see *Dworsky v. Arndtstein*, 29 App. Div. 274, 51 N. Y. Supp. 597.

¶ 18 Exclusive Jurisdiction; Proof of Residence or Domicile in the County.

Jurisdiction acquired by domicile or residence in the county.

One of the important questions to be determined before a proceeding is begun in a Surrogate's Court, is whether or not the deceased person was a resident of that county at the time of his death, or whether an infant is then a resident, or has sojourned within the county for one year. Upon the fact of residence depends the jurisdiction of the Surrogate's Court of that particular county, and that fact must be decided as a preliminary question before proceeding to the performance of other duties devolving upon a surrogate. It becomes necessary, therefore, that the surrogate should hear the evidence and determine the matter.

Such questions arise where there is a conflict of jurisdiction between two or more surrogates as to which one has juris-

diction of the estate of the deceased person or of the person or property of an infant.

“ As domicile and residence are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

“ The existing domicile, whether of origin or selection, continues until a new one is acquired and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals. Less evidence is required to establish a change of domicile from one State to another than from one nation to another. In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time with the intention in good faith to change the domicile, has that effect. Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention, but not controlling, for unless combined with intention it cannot effect a change of domicile. *Dupuy v. Wurtz*, 53 N. Y. 556, 561.

“ There must be a present, definite and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration. The subject is under the absolute control of every person of full age and sound mind who is free from restraint, unless it may be that

the domicile of a wife is controlled by that of her husband as long as she lives with him. Subject to the qualifications named every human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim or fancy, for business, health or pleasure, to secure a change of climate, or a change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another and the acts of the person affected confirm the intention. No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both, clear and convincing. A temporary residence for a temporary purpose, with intent to return to the old home when that purpose has been accomplished, leaves the domicile unchanged, but even if the residence was begun for a temporary purpose, intention may convert it into a domicile. When a new domicile has been actually acquired it does not necessarily revert, even if not followed by continuous residence. There may be many absences from the new place and protracted sojournings in the old, unless intention and residence unite again, when still another change of domicile is effected.

“ This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice. As we have seen, a person may select and make his own domicile, and no one may let or hinder. He may elect between his winter and summer residence and make a domicile of either. The right to choose implies the right to declare one's choice, formally or informally as he prefers, and even for the sole purpose of making evidence to prove what his choice was. Such declarations are not self serving in an improper sense, unless they are made with intent to deceive.”

Matter of Newcomb, 192 N. Y. 238; affg. 122 App. Div. 920; *U. S. Trust Co. v. Hart*, 150 App. Div. 413, 135 N. Y. Supp. 81.

Resident; inhabitant.

The word "resident," as used in § 45 Sur. Ct. A., subdivision 1, has been construed to mean "inhabitant." The old Code did use the word "inhabitants;" and, as the courts have construed the meaning of the term in this section the legislature did not intend to place any further limitation upon the surrogate's jurisdiction by substituting the word "resident." The word "resident" is co-ordinate with and intended in that particular instance to have the same meaning as that ordinarily attached to the word "inhabitant."

The Court of Appeals in *Bolton v. Schriever*, 135 N. Y. 65, has presented an exhaustive review of the questions of the surrogate's jurisdiction as founded upon this section; and, throughout the opinion, are used the words "inhabitancy" and "inhabitant."

Residence and domicile defined.

The terms "residence" and "domicile" have been held to be synonymous. *De Meli v. De Meli*, 120 N. Y. 491; *People v. Platt*, 117 id. 167.

To effect a change of domicile for the purpose of succession there must be not only a change of residence but an intention to abandon the former domicile and acquire another as a sole domicile.

Domicile of origin is presumed to continue until a new one is acquired.

Residence alone has no effect *per se*, except as ground from which to infer intention.

Length of residence will not alone effect the change.

Intention alone will not do it, but the two must be concurrent to effect a change of domicile.

The intention may be gathered both from acts and declarations.

Acts are the most important and written declarations usually more reliable than oral ones. *Matter of Cleveland*, 28 Misc. Rep. 369, 59 N. Y. Supp. 985; *Dupuy v. Wurtz*, 53 N. Y. 556; *Cruger v. Phelps*, 21 Misc. Rep. 252, 47 N. Y. Supp. 61; *Matter of Jones*, 19 Misc. Rep. 80, 43 N. Y. Supp. 965.

Domicile of married women.

The domicile of a married woman is presumptively that of her husband. *Hunt v. Hunt*, 72 N. Y. 217; *Matter of Bain*, 104 Misc. Rep. 508, 172 N. Y. Supp. 604. But where the proof shows that the husband and wife are unable to live together or have consented to live apart, the wife may in fact acquire a separate domicile. *Matter of Florence*, 54 Hun, 328, 7 N. Y. Supp. 578; *Matter of Bushbey*, 59 Misc. Rep. 317, 112 N. Y. Supp. 262.

Incompetent person cannot change domicile.

Where there is a long continued domicile of origin, a change can not be made by a person of such weak and unsound mind that he can have no intent to make such change. *In re Horton's Will*, 175 App. Div. 447, 161 N. Y. Supp. 1071.

The domicile of an infant is usually that of the father, and the infant being incompetent, can not change it. See ¶ 95.

Determination of question of domicile.

The duty to investigate and decide upon the fact of inhabitancy is necessarily and naturally to be implied from the whole provisions of the statute. If no contest is made and there is no evidence upon the subject of the inhabitancy of the testator one way or the other, except the sworn allegation in the petition, the surrogate may rely upon the fact so stated.

“ In the organization of the tribunals which are to exercise this jurisdiction, although the language of the statute may create a separate and distinct tribunal for each county in the State, and upon certain facts grant jurisdiction to one of them to the exclusion of all others, yet the facts upon which

the jurisdiction is given to the court of one county instead of to another are merely incidental, partaking somewhat of the character of matters of procedure, the main fact being the actual death of an individual who, at the time of his death, was an inhabitant of the State. That is the jurisdictional fact upon the existence of which is founded the duty of the State to protect and distribute the property according to law. Whether one or the other of the Surrogate's Courts in the various counties shall administer upon the estate, and thus fulfill the obligation which lies with the State itself, is a question which the Legislature has provided for and it depends, among other things, upon the fact of inhabitancy. This fact the surrogate to whom the matter is presented must decide, and if he decide that it exists and upon evidence which legally tends to support his decision, under such circumstances, it ought to stand until reversed. This is believed to be the general rule. It is a matter of very trifling importance except upon the mere question of convenience, which of such Surrogate's Courts shall take the proof as to the due execution of the will, and grant letters testamentary thereon." *Bolton v. Schriever*, 135 N. Y. 65; *Matter of Walker*, 54 Misc. Rep. 177, 105 N. Y. Supp. 890.

The statement of residence in a holographic will is entitled to great weight, but in one prepared by an attorney where he inserts the place of residence as in part a matter of form, such statement is not controlling. *Matter of Brant*, 30 Misc. Rep. 14, 62 N. Y. Supp. 997; *Matter of Golden*, 40 Misc. Rep. 544, 82 N. Y. Supp. 990; *Tucker v. Field*, 5 Redf. 174.

The surrogate should and is presumed to make all necessary inquiry so as to decide upon probate whether the deceased was a resident of his county. *Bolton v. Schriever*, 135 N. Y. 65, affg. 35 N. Y. St. Repr. 91.

Where an issue is made as to the residence of the testator that issue must be first tried by the surrogate. *Matter of Jones*, 19 Misc. Rep. 80, 43 N. Y. Supp. 965.

In admitting a will to probate, the surrogate determines

the question of *residence* and not the question of domicile. *Flataner v. Loser*, 156 App. Div. 591, 141 N. Y. Supp. 951.

Intention is now regarded as an issuable fact, and evidence of intention can be considered and proved. *In re Martin's Est.*, 157 N. Y. Supp. 474; Rev. upon the facts 173 App. Div. 1, 158 N. Y. Supp. 915, 94 Misc. Rep. 81.

Burden of proof.

It is incumbent on those who assert a change of domicile from the domicile of origin to that of choice, to make it out by competent and sufficient evidence. *Matter of McElwaine*, 47 N. Y. Law J. 1315. Otherwise the domicile of origin or in case of a married woman, her matrimonial domicile will prevail. *Dupuy v. Wurtz*, 53 N. Y. 556; *Matter of Newcomb*, 192 N. Y. 238.

Where there is an allegation of change of domicile, the burden of proof is upon the party alleging such change. *Tucker v. Field*, 5 Redf. 175.

Domicile of origin continues until there is proof that a new one is acquired. *Von Hoffman v. Ward*, 4 Redf. 244

¶ 19 Jurisdiction; How Affected by Location of Property, or Debts; Rights of Nonresidents to Use of Our Courts.

Location of property.

A debt upon simple contract follows the debtor and has its *situs* where he has his abode. *Beers v. Shannon*, 73 N. Y. 292; *Kohler v. Knapp*, 1 Bradf. 241. But § 47 provides that a debt evidenced by a bond, promissory note, or other instrument for the payment of money only, in terms negotiable or payable to the bearer or holder is regarded as personal property where it is.

A savings bank book is a mere evidence of indebtedness and is not property in another State where it is left by a resident of this State, the bank being located in this State. *Marks v. Em. Ind. S. B.*, 122 App. Div. 661, 107 N. Y. Supp. 491.

Real estate in county.

Where a nonresident has an interest in real estate located in any county of this State, the surrogate of that county has jurisdiction to probate such person's will. *Matter of Weston*, 60 Misc. Rep. 275, 113 N. Y. Supp. 619; aff'd, 131 App. Div. 901, 115 N. Y. Supp. 1149.

Nonresident dying within the State; location of property.

The existence of a Japanese folding chair in the county gives the surrogate jurisdiction to take probate of a will of a nonresident, and such jurisdiction is not affected by the fact that such property is not assets applicable to the payment of debts. *Matter of Nelson*, 2 Dem. 265.

Nonresident dying without the State; location of property.

Assets were brought here from another State but it appeared that there were no creditors in the other State, and all the next of kin resided in this State — *held* that the surrogate had jurisdiction. *Matter of Hughes*, 95 N. Y. 55.

A note secured by mortgage on land in another State is personal property where the note is (§ 47 Sur. Ct. A.), and gives the court jurisdiction to take the proof of a will of a nonresident. *Matter of Hopper*, 5 Dem. 242.

An infant interested in a will which has been probated in another State without personal service of notice and appointment of special guardian for him may maintain a proceeding to probate the will in this State notwithstanding the decree in the foreign State. *Matter of Law*, 56 App. Div. 454, 67 N. Y. Supp. 857.

A watch and chain of deceased brought into this State for the purpose of giving a surrogate jurisdiction is not sufficient for that purpose. *Hoes v. N. Y., N. H. & H. R. R. Co.*, 173 N. Y. 435, revg. 73 App. Div. 363, 77 N. Y. Supp. 117.

Where a nonresident dies owning stock of a domestic corporation, such stock is, within the meaning of subdivision 3 of section 45 Sur. Ct. A., property within that county where the

corporate property is, or where the corporation has its principal place of business. The provisions of section 45 Sur. Ct. A. apply to exclusive jurisdiction; and where there is no personal property within the State, and the decedent left real property in one county, and no other, that county has exclusive jurisdiction; but under section 46, where he left personal property within two counties, then both of those counties have concurrent jurisdiction. The words "no other" in section 45 relate to exclusive jurisdiction, and do not affect the concurrent jurisdiction which section 46 conferred upon these Surrogates' Courts where personal property of a decedent is in two or more counties. *Matter of Arnold*, 114 App. Div. 244, 99 N. Y. Supp. 740.

Grant of letters upon estates of nonresidents; property within the State or county unadministered.

Personal property temporarily within a county of this State in the possession of a domiciliary administrator is not sufficient to give the Surrogate's Court of that county jurisdiction to appoint an administrator of the estate of a nonresident decedent in that county. *Matter of McCabe*, 84 App. Div. 145; aff'd, 177 N. Y. 584; *Sedgwick v. Ashburner*, 1 Bradf. 105; *Townsend v. Pell*, 3 Dem. 367; *Evans v. Schoonmaker*, 2 Dem. 249, aff'd, 31 Hun, 638, Dist. 34 N. Y. St. Rep. 318, 12 N. Y. Supp. 64.

Recorded mortgage.

Simply showing the record of the recording of a mortgage to the deceased is not sufficient, unless it appears that he was the owner of it at the time of his death. *Steele v. Conn. Gen. L. I. Co.*, 31 App. Div. 389; aff'd, 160 N. Y. 703.

Nonresident negligently killed within the county. See ¶¶ 82, 417.

The surrogate of a county in which a nonresident may have been killed through the negligence of a person or corporation has jurisdiction to grant letters of administration based upon the right of action as "personal property within the State,"

by virtue of the special provision of subd. 13, § 314, Sur. Ct. A. See § 133 Dec. Est. Law, ¶ 86.

Nonresident killed in another State by a foreign corporation.

The same rule does not obtain where a nonresident is killed in another State by a foreign corporation, and letters of administration cannot in such a case be granted based upon the cause of action. The existence of personal property within the State must be clearly shown, and every effort made to prevent an imposition upon our courts, as they have repeatedly refused to take jurisdiction of such a cause of action. *Pietraroia v. N. J. & H. R. R. & F. Co.*, 131 App. Div. 829.

This case was affirmed, 197 N. Y. 434, but the only point discussed was the claim that a joint deposit of husband and wife in a bank constituted personal property belonging to the deceased depositor upon which letters could be issued.

Applications by nonresidents for the sole purpose of bringing actions in our courts.

The Supreme Court has many times refused to entertain jurisdiction in certain cases between nonresidents and has condemned the practice of importing such litigation into this jurisdiction. In *Robinson v. Oceanic Steam Nav. Co.* (112 N. Y. 315), the court, referring to this subject, said: "The discrimination between resident and nonresident plaintiffs is probably based upon reasons of public policy, that our courts should not be vexed with litigations between nonresident parties over causes of action which arose outside of our territorial limits. Every rule of comity and of natural justice and of convenience is satisfied by giving redress in our courts to nonresident litigants when the cause of action arose or the subject matter of the litigation is situated within this State." This case was cited with approval in *Hoes v. N. Y., N. H. & H. R. R. Co.* (173 N. Y. 435), where the court strongly reprobated a device by which it was sought to acquire jurisdiction over a foreign corporation by bringing personal property of

an intestate into this State and then applying for letters of administration upon the ground that there was personal property within the State. In *Collard v. Peach* (81 App. Div. 582, 81 N. Y. Supp. 619), the court held that it would not retain jurisdiction of an action brought by a resident of the State of Connecticut against another resident of that State upon a cause of action arising therein to recover damages for personal injuries sustained by plaintiff through the alleged negligence of the defendant, unless special facts and circumstances were shown to exist which required such retention. And in *Ferguson v. Neilson* (58 Hun, 604, 11 N. Y. Supp. 524, 33 N. Y. St. Repr. 814), Van Brunt, P. J., said that it was against the settled policy of the State to permit our courts to be used by nonresidents for the redress of personal injuries received in the State of their domicile. See also, *Pietraroia v. N. J. & H. R. R. & F. Co.*, 131 App. Div. 829, 116 N. Y. Supp. 249; *aff'd*, 197 N. Y. 434.

Jurisdiction, how affected by locality of debts.

For the purpose of conferring jurisdiction upon a surrogate's court, a debt owing to a decedent by a resident of the state is regarded as personal property situated within the county where the debtor, or either of two or more joint debtors, resides; and a debt owing to him by a domestic corporation is regarded as personal property situated within the county where the principal office of the corporation is situated. But the foregoing provision does not apply to a debt evidenced by a bond, promissory note, or other instrument for the payment of money only, in terms negotiable, or payable to the bearer or holder. Such a debt, whether the debtor is a resident or a non-resident of the state, or a foreign or a domestic government, state, county, public officer, association, or corporation, is, for the purpose of so conferring jurisdiction, regarded as personal property at the place where the bond, note or other instrument is, either within or without the state. § 47, *Sur. Ct. A. Former § 2517, Code Civ. Pro.*

Title of the representative.

The title to the debt and the money represented thereby is in the representative for the purposes of administration, although he is eventually bound to account for and distribute the proceeds to those ultimately entitled thereto. This title and right affords the basis for this section which gives the

Surrogate's Court of the county mentioned the right to undertake administration of the estate. *Homans v. N. Y. Life Ins. Co.*, 55 Misc. Rep. 574.

Insurance policy.

A policy of insurance issued by a foreign corporation authorized to do business in this State to a resident and held by him within the State or by his assignee, is personal property within the State. *Morgan v. Mut. Ben. Life Ins. Co.*, 189 N. Y. 447; aff'g, 119 App. Div. 645.

An insurance policy issued by a New York company and payable to the estate of deceased is an asset in the county where the corporation is located, even though the policy is out of the State. *Matter of Miller*, 5 Dem. 381.

¶ 20 Jurisdiction of Persons; When and How Obtained.

Jurisdiction of persons; when and how obtained.

The surrogate's court, in any proceedings before it, shall have jurisdiction of the following described persons:

1. The petitioner.
2. Parties who have been duly cited, including all those described as being persons belonging to a class, or connected with the decedent, or as interested in the property or matter in question, whether designated by their full and correct names or not.
3. Persons of full age who have not been judicially declared to be incompetent to manage their affairs,
 - a. Who shall, either before or after the filing of the petition, waive the issue or service, or both, of the citation by an instrument in writing signed, acknowledged, or proved and duly certified.
 - b. Who, whether named in the petition or citation or not, shall appear personally in court and file written signed notice of appearance acknowledged, or proved, and duly certified.
 - c. Who, whether named in the petition or citation or not, shall appear by attorney whose authority in writing to appear, so signed, acknowledged, or proved, and duly certified, shall be filed.

§ 41, *Sur. Ct. A.* Former § 2511, *Code Civ. Pro.*

Subd. 1. Jurisdiction is obtained of the petitioner by his filing of the petition and instituting the proceeding. By so doing he submits himself and his interests to the jurisdiction of the court.

Subd. 2. The citation may be directed to persons constituting a class, and to persons whose correct names are not known and to persons who are unknown by any name. Section 54, ¶ 26.

Such persons may be described as belonging to a certain class, as brothers, nephews, cousins, legatees, devisees or any other description which will designate their interest in the matter. Provision is made for acquiring jurisdiction of such persons through service by publication. Section 56, ¶ 28.

Subd. 3-a. Persons of full age and competent may waive the issue and service of citation by an instrument in writing duly acknowledged, as they have the right of submitting themselves to the jurisdiction of the court without service of process.

b. A person of full age and competent may likewise make himself a party to any proceeding in which he can show he has an interest.

Subd. c. Most surrogates now refuse to allow an attorney to appear for a person not cited without written authority. This practice differs from that of the Supreme Court, but on account of the peculiar jurisdiction of Surrogate's Court, it has never been considered safe practice to allow an attorney to appear for a party not served, unless he produced authority equivalent to a waiver of service of citation.

Waiver.

Waiver of issue and service of process is a paper signed and acknowledged by a person of full age and competent dispensing with service of citation or other process upon him. Often it is a saving of expense and time to have persons friendly to the proceeding execute such waivers.

Waiver under the present section may be made either before or after issue of citation. Appearance must be in writing. § 63, ¶ 30.

No jurisdiction will be acquired over a person whose name is inserted in the citation after it has received the signature

of the clerk of the Surrogate's Court. *Boerum v. Betts*, 1 Dem. 471.

Jurisdiction of the person is not limited to those cases where a citation is issued, but jurisdiction may be obtained by use of other process authorized.

The word "cited" in section 41 does not mean that no jurisdiction is obtained of the person unless a citation has been issued. This is sufficiently shown by the provisions of the Surrogates' Court Act, which provide for the use of other forms of process. The word "cited," then, as used in section 41 Sur. Ct. A., must be taken in its broad and general sense to mean "to summon, to command the presence of a person; to notify a person of legal proceedings against him and require his presence thereto." Bouvier's and Black's Law Dictionaries. *Matter of Eno*, 180 N. Y. Supp. 889.

¶ 21 Jurisdiction; Substitution of Attorneys; Attorney's Lien.

Substituting of attorneys and fixing their compensation in such cases.

"An attorney may be changed by the court or a judge thereof on the consent of the party and the attorney, or application of the party on such terms as shall be just." Rule 10, Civil Prac.

Under this rule it has been held that a surrogate has authority to direct substitution of attorneys in proceedings pending before him and to adjust the retiring attorneys' compensation. *Chatfield v. Hewlett*, 2 Dem. 191, distinguished in 12 N. Y. Supp. 88.

The surrogate cannot make an order substituting attorneys and directing the turning over of papers, when no proceeding is pending before him. *Matter of Krakauer's Estate*, 33 Misc. Rep. 674, 68 N. Y. Supp. 935.

Jurisdiction cannot be conferred by consent upon the surrogate to order substitution of attorneys. *Matter of Krakauer's Estate*, 33 Misc. Rep. 674, 68 N. Y. Supp. 935.

Proceeding under this rule of court should not be confused

with enforcing an attorney's lien upon his client's cause of action, or papers. The right which a surrogate, or Surrogate's Court, has to order a substitution of attorneys and fix the compensation of the retiring attorney is entirely different from the right to entertain a proceeding regarding an attorney's lien. The right to enforce such a lien comes from an entirely different source.

The practice followed by Mr. Surrogate Fowler in New York county, was as follows:

If objection was made to the substitution of attorneys, the court fixed the amount of the lien and granted the substitution, but if no objection was made and no claim made of a lien he granted the motion and refused to decide questions regarding services. *In re Adjello's Est.*, 175 N. Y. Supp. 729.

Appeal from order.

An order overruling objections to the jurisdiction of the surrogate to fix the value of attorney's services does not affect a substantial right and is not appealable. *Matter of Loëwenguth*, 114 App. Div. 754.

Power to enforce attorney's lien for compensation.

The compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained by law, except that no agreement made hereafter between an attorney and a guardian of an infant for the compensation of such attorney, dependent upon the success of the prosecution by said attorney of a claim belonging to said infant, or by which such attorney is to receive a percentage of any recovery or award in behalf of such infant or a sum equal to a percentage of any such recovery or award, shall be valid or enforceable unless made as hereinafter provided. An attorney may contract with the guardian of an infant to prosecute, by suit or otherwise, any claim for the benefit of an infant for a compensation to said attorney dependent upon the success in the prosecution of such claim, subject to the power of the court, as hereinafter provided, to fix the amount of such compensation. Whenever such a contract shall have been entered into between an attorney and a guardian of an infant, upon the recovery of a judgment, or the obtaining of an award in behalf of the said infant, or upon any compromise or settlement of such claim, the attorney may apply, upon notice to the guardian, to the judge or justice before whom the said action or proceeding was tried, in case the said action or proceeding was tried at a court held within this state; or to a special term of said court, in case the said action or proceeding was tried

before some person other than a justice thereof, or said claim was compromised or settled after said suit was begun, or in case of the death or disability of the judge or justice before whom the action was tried; or to a special term of the supreme court in case the recovery, award, compromise or settlement was not had in any court of this state; such application shall set forth briefly the contract, the services performed by the attorney and pray that there be awarded to him a suitable amount out of the recovery, award, compromise or settlement obtained through his efforts as attorney on behalf of the infant; the court to which such application is made, upon being satisfied that due notice of the said application has been given to the said guardian, shall proceed summarily to determine the value of the services of said attorney, taking such proof from either the attorney or the guardian by affidavit, reference or the examination of witnesses before the said court, as to the said court may seem to be necessary and proper, and shall thereupon make an order determining the suitable compensation for the attorney for his services therein, which sum shall thereafter be received by the said attorney for his services in behalf of the said infant; and no other compensation shall be paid or allowed by the guardian for such services out of the estate of said infant. If a copy of such order awarding the compensation with notice of entry be thereafter served by the said attorney upon the adverse party to the said litigation or the person making such compromise or settlement and upon the custodian of the funds recovered, in case there be such custodian, such award shall become and constitute a lien to the amount thereof on behalf of the said attorney upon such recovery, award, settlement or fund.

§ 474, *Judiciary Law*.

From the commencement of an action or special proceeding, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien can not be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien.

§ 475, *Judiciary Law*.

The proceeding is a special proceeding.

By the amendment of said section in 1899 (Laws of 1899, chap. 61), a special proceeding was included therein, and the court was given express authority upon the petition of the client or attorney to "determine and enforce the lien" therein mentioned.

Upon filing a petition either a citation or an order to show cause may issue. As no procedure is specified in this section, the general practice of the court in which the petition is filed should be followed. *Matter of Eno*, 180 N. Y. Supp. 889.

The only lien which can be adjusted in Surrogate's Court upon a summary application is the lien established by section 475, Judiciary Law. That is a lien upon the client's "cause of action, claim or counterclaim." It attaches to the "verdict, report, decision, judgment or final order" in the client's favor. It is also indicated that this lien cannot be affected by settlement between the parties before or after judgment or final order.

The lien which is the subject of this language is not a lien upon property of a tangible and chattel nature. It is limited to the cause of action — the abstract controversy. It is distinct from the common-law lien which the lawyer, like the tailor and the wagon maker, has upon the thing which is the subject of his labor or which has come into his hands in the course of his services.

As to the statutory lien, there can be no inquiry or disposition unless there is a proceeding in which is asserted the cause of action upon which the lien is said to be imposed. Even if there be such proceeding, there must obviously be an appearance therein in behalf of the client by the alleged lienor, and, further, no practical test or application of the lien can be made unless the proceeding has reached a result from which the lien may be satisfied or a stage at which the lien is about to be endangered unless discharged or secured. *Matter of Robinson*, 59 Misc. Rep. 323, 112 N. Y. Supp. 280.

The statute must be construed liberally (*Fischer-Hansén v. Brooklyn Heights R. R. Co.*, 173 N. Y. 492, 33 Civ. Pro. Rep. 326) and as so construed it gives to Surrogates' Courts power to determine the lien and the amount thereof and to enforce it.

The Court of Appeals in *Matter of Regan* (167 N. Y. 338) say: "It seems to us that the power of the Surrogate's Court to protect the lien of an attorney has been assimilated by modern legislation to the power exercised in that respect by the Supreme Court and the other courts of record of the State. There is now no reason that we can perceive for denying this

power to a court that exercises such extensive jurisdiction over persons and property. An attorney, duly admitted to practice in all the courts of record of the State, is an attorney of the Surrogate's Court, and his functions as an officer of that court are quite as important to the community and to his clients as the services that he may perform in any other court.

Where the attorney has the money in his possession, he has a lien upon it for services in procuring it, and the surrogate may fix the value of the services. *In re O'Connor's Est.*, 177 App. Div. 616; 164 N. Y. Supp. 574, rev'ing 162 N. Y. Supp. 957.

In *Matter of Fitzsimons* (174 N. Y. 15, 33 Civ. Pro. Rep. 336), the court, on an appeal from an order made in a proceeding before the surrogate for a compulsory accounting by an administratrix and in which the appellant, an attorney, presented a petition setting forth facts entitling him to a part of any recovery to which his clients would be entitled upon such accounting and to compensation as attorney for the contestants, say: "That the proceeding instituted by the appellant to establish his lien was a special proceeding which might be properly instituted in a Surrogate's Court there is now no doubt."

An attorney has a lien upon his client's papers independent of the statutory provision. *Matter of McGuire*, 106 App. Div. 131, 94 N. Y. Supp. 97.

An attorney may, by agreement with his client, have a lien upon his client's interest in the estate, but such an agreement cannot be enforced by the surrogate upon real estate for which the executor cannot be made to account. *Matter of Fernbacher*, 5 Dem. 219, 18 Abb. N. C. 1.

An attorney, having an assignment to protect a contingent fee, may contest a judicial settlement of the accounts of the representative of the estate which contains the fund upon which he claims a lien, and may require an investigation of his rights. *Matter of Fitzsimons*, 174 N. Y. 15; rev'g, 77 App. Div. 345, 79 N. Y. Supp. 194.

An alleged lien under an agreement to pay one-third of about \$2,000 recovered was not enforced but \$300 was allowed. *Matter of Pieris*, 82 App. Div. 466, 81 N. Y. Supp. 927; *affd.*, 176 N. Y. 566.

Where money was obtained through an administrator appointed in Surrogate's Court, that court has jurisdiction to determine the attorney's lien upon the fund. *Matter of Pieris*, 82 App. Div. 466, 81 N. Y. Supp. 927; *affd.*, 176 N. Y. 566.

An attorney's lien may be enforced by an order vacating the satisfaction of a decree made in fraud of the right of such attorney. *Matter of Regan*, 167 N. Y. 338; *rev'g*, 58 App. Div. 1, 68 N. Y. Supp. 527.

Proceedings for probate may be withdrawn against the objection of an attorney claiming a lien for fees. *Matter of Evans' Will*, 33 Misc. Rep. 567, 68 N. Y. Supp. 936; *Matter of Wittner* (1890), N. Y. Surr. Dec. 464.

The rule that the contracts of an executor and administrator bind them personally and not the estate does not apply, and an attorneys' lien is good against the fund. *Matter of Ross*, 123 App. Div. 74, 107 N. Y. Supp. 899.

Guardian; lien on recovery on behalf of infant.

See Judiciary Law, § 474 as amended by chap. 229, L. 1912, *ante*.

The attorney must procure his compensation to be fixed by the Supreme Court, and when that is done he has a lien upon the fund.

Priority over receiver or trustee in bankruptcy.

The attorneys' lien is prior to that of a receiver appointed in supplementary proceedings. *Dienst v. McCaffrey*, 66 N. Y. St. Repr. 200, 32 N. Y. Supp. 818, 24 Civ. Pro. Rep. 238.

Prior to that of a trustee in bankruptcy. *Kneeland v. Pennell*, 54 Misc. Rep. 43, 104 N. Y. Supp. 498, 38 Civ. Pro. Rep. 489.

Lien upon income of trust estate.

In *Estate of Hoyt* (12 Civ. Pro. Rep. 208, 8 N. Y. St. Repr. 786), Rollins, surrogate, in substance held that an attorney's lien for services rendered upon a contest over the admission to probate of a will did not attach to the income of a trust estate created for the benefit of a daughter, for the reason that no person beneficially interested in a trust for the receipt of rents and profits can assign or in any manner dispose of such interest; that a person to whom such person is indebted may in a court of general equity jurisdiction and not elsewhere, in a proceeding where the issue is directly made as to the amount necessary for the debtor's support and not otherwise, reach any trust income belonging to the debtor, in excess of the sum necessary for the education, support, and maintenance of himself and family.

In the case of *Noyes v. Blakeman* (6 N. Y. 567), it was held that an attorney who defends a suit affecting the validity of a trust, at the request of the *cestui que trust* without the concurrence of the trustee, cannot reach the surplus income of the trust estate under section 57 of the statute relative to uses and trusts to pay the costs of such defense, for the reason that he is not a creditor of the *cestui que trust* within the meaning of that statute; that it was the duty of the trustee to use reasonable diligence to protect the trust estate and he would have a lien upon it for the expenses of such protection.

In *Tolles v. Wood* (99 N. Y. 616), the action was brought by a judgment creditor in equity to procure the payment of his judgment out of the surplus income beyond what was necessary for the suitable support and maintenance of the *cestui que trust* and it was held that he could recover, inasmuch as it was determined that the surplus was sufficient to pay such judgment.

An attorney may have a lien for his services in procuring payment by a trustee of income left for support, upon such fund when collected, although it may not be liable for general debts or services. *Matter of Williams*, 187 N. Y. 286, revg. 114 App. Div. 904.

Proper parties.

Trustees not proper parties when they received nothing belonging to the client against whose interest the lien is claimed. *Sullivan v. McCann*, 115 App. Div. 146, 100 N. Y. Supp. 736.

Interest of lienor in estate; petition.

An attorney acting for administrators who are distributees has no lien on the general estate and can not petition for judicial settlement as a person interested. He has a right to be paid from the funds of the estate, and the surrogate may issue a citation to the end that the proper amount due may be ascertained and the representatives directed to pay the same. *In re Rabell*, 175 App. Div. 345, 162 N. Y. Supp. 218; *In re Nocton's Est.*, 162 N. Y. Supp. 215; *In re Hasbrouck*, 153 App. Div. 394, 138 N. Y. Supp. 620; Appeal dism. 208 N. Y. 586. These cases were distinguished in a case where the attorney had possession of the fund. *In re O'Connor's Est.*, 177 App. Div. 617, 164 N. Y. Supp. 574.

Order should establish lien; no execution should issue.

It is not proper to direct in the order fixing the lien, that execution shall issue. *Matter of Smith*, 111 App. Div. 23, 97 N. Y. Supp. 171, 18 Ann. Cas. 55.

The attorney claiming a lien should file an affidavit showing the value of his services and the extent to which they are unpaid, and what agreement or contract he had for their payment. *Barry v. Third Ave. R. R. Co.*, 87 App. Div. 543, 84 N. Y. Supp. 830.

Set-off of costs against costs or judgment will not be allowed to defeat attorney's lien.

The lien of the attorney for his unpaid services is superior to that of a party desiring to enforce an equitable set-off of judgments. *Barry v. Third Ave. R. R. Co.*, 87 App. Div. 543, 84 N. Y. Supp. 830; *Gibbs v. Prindle*, 11 App. Div. 470, 42 N. Y. Supp. 329.

Set-off of costs not allowed where the client had assigned them to his attorney. *Matter of Havemeyer*, 27 App. Div. 123, 50 N. Y. Supp. 126.

To the amount of such lien the attorney is to be deemed an equitable assignee of the judgment. *Marshall v. Meech*, 51 N. Y. 140; *Tunstall v. Winton*, 31 Hun, 219.

¶ 22 Jurisdiction; Commitment of Insane Person; Adoption of Minors; Support of the Poor.

Jurisdiction to commit insane persons to institutions.

The surrogate, as a judge of a court of record, has power to commit insane persons to public or private institutions under the provisions of the Insanity Law, Art. IV, § 80.

Costs.

The proceeding under the Insanity Law is not a special proceeding so far as granting costs is concerned, and chapter 428, Laws of 1904, deprived the surrogate of the right to impose costs on petitioner. *Matter of Murtaugh*, 117 App. Div. 302, 102 N. Y. Supp. 176, 38 Civ. Pro. Rep. 79.

Jurisdiction to permit adoption of minors.

The provisions regulating the adoption of minors are found in Domestic Relations Law, §§ 110-118.

Definitions; effect of article.

Adoption is the legal act whereby an adult person takes another adult person or a minor into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect to such adult or minor. Hereafter, in this article, the person adopting is designated the "foster parent." A voluntary adoption is any other than that of an indigent child, or one who is a public charge from an orphan asylum or charitable institution.

An adult unmarried person, or an adult husband and his adult wife together, may adopt a person of the age of twenty-one years and upwards or a minor in pursuance of this article, and a child shall not hereafter be adopted except in pursuance thereof. Proof of the lawful adoption of a person of the age of twenty-one years and upwards or a minor heretofore made may be received in evidence, and any such adoption shall not be abrogated by the enactment of this chapter and shall have the effect of an adoption hereunder. Nothing in

this article in regard to an adopted child inheriting from the foster parent applies to any will, devise or trust made or created before June twenty-fifth, eighteen hundred seventy-three, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created; and nothing in this article in regard to an adult adopted pursuant hereto inheriting from the foster parent applies to any will, devise or trust, made or created before April twenty-second, nineteen hundred and fifteen, alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, an adult so adopted is not an heir so as to alter estates or trusts or devises in wills so made or created. § 110, *Dom. Rel. Law.*

While adoption was early recognized by the civil law, it was not recognized by the common law and exists in the United States only by special statute; that statutes authorizing adoption, therefore, being in derogation of the common law, should be strictly construed and that it follows, as a consequence, that there is no presumption that minor children living with people whose name they have taken are to be regarded as adopted children.

It has been held that a verbal agreement between the father and another to the effect that the latter should have custody of the child did not constitute an adoption of such child. *Taylor v. Deseve*, 81 Tex. 246.

Also, that where an instrument intended to effect an adoption of an infant was duly signed by his surviving parent, but the parties who meant to adopt the child did not execute it because of the illness of the justice, such act was insufficient to constitute an adoption. *Long v. Hewitt*, 44 Iowa, 363.

Also, where articles of adoption of a child were duly executed and acknowledged, but were not filed until after the death of the person making the adoption, it was held that the act was incomplete and the child could not be regarded as legally adopted. *Tyler v. Reynolds*, 53 Iowa, 146.

And in our own State, in the *Matter of Thorne* (155 N. Y. 140), it has been held that, where parties executed papers reciting that they would adopt an infant child and, in pursuance of such papers, such child became a member of the household of her foster-parents, which relation was maintained down to

1897, such papers were insufficient as having been executed previous to the statute of this State authorizing such an adoption.

It has also been held in this State that, in the absence of evidence showing that the statutory method of adoption had been pursued, the fact that, upon the record-books of the orphan asylum from which the child was taken, it was noted that the child was "adopted" by her foster-parents, and that, subsequently, she went to live with such foster-parents and was treated in every respect as their child and bore their names and, upon the death of the foster-father, that he left a will and codicil in which he described the child as his adopted daughter, this was insufficient to constitute an adoption, or to raise a presumption that adoption papers had been legally executed. Parties affirming the adoption of the deceased must, necessarily, bear the burden of establishing that fact. *Heinemann v. Heard*, 62 N. Y. 448. See *Matter of Huyck*, 49 Misc. Rep. 391, 99 N. Y. Supp. 502.

The statute in relation to the adoption of children does not require the County Judge to witness by his signature the consent of the parties adopting the child; it is sufficient if the order recites that the parties appeared before him and that they signed the necessary consents. *People ex rel. Burns v. Bloevel*, 42 N. Y. St. Repr. 453.

The saving clause in the Adoption Acts does not legalize private agreements executed without authority of law. *Matter of Thorne*, 155 N. Y. 140.

A contract in the nature of an adoption agreement may be specifically enforced. *Brantingham v. Huff*, 43 App. Div. 414, 60 N. Y. Supp. 157.

Objections will be overruled where the order entered recites the performance of all the jurisdictional acts. *Von Beck v. Thomson*, 60 N. Y. Supp. 1094; aff'd, 167 N. Y. 601.

Adoption from charitable institutions.

An orphan asylum or charitable institution, incorporated for the care of orphan, friendless or destitute children may place children for adoption and the adoption of every such child, shall, when practicable, be given to persons

of the same religious faith as the parents of such child. The adoption shall be affected by the execution of an instrument containing substantially the same provisions as the instrument provided in this article for voluntary adoption, signed and sealed in the corporate name of such corporation by the officer or officers authorized by the directors thereof to sign the corporate name to such instruments, and signed by the foster parent or parents and each person whose consent is necessary to the adoption; and may be signed by the child, if over twelve years of age; all of whom shall appear before the county judge or surrogate of the county where such foster parents reside or, if such foster parents do not reside in this state, in the county where such institution is located, and be examined except that such officers need not appear; and such judge or surrogate may thereupon make the order of adoption provided by this article. Such instrument and order shall be filed and recorded in the office of the county clerk of the county where such adoption takes place and the adoption shall take effect from the time of such filing and recording. § 115, *Dom. Rel. Law.*

Adoption of illegitimate child.

Subdivision 3 of section 111 of the Domestic Relations Law, was amended by chapter 655, L. of 1921, providing for adoption of illegitimate children, and by such amendment the superintendent or head of a hospital where such child is shall be required to give consent. The amended subdivision follows:

Whose consent necessary.

3. Of the parents or surviving parent of a legitimate child; and of the mother of an illegitimate child, or of the superintendent or other managing head of a hospital which has been continuously operated in this state for a period of at least five years last past or is duly licensed or incorporated as required by statute, in whose care or charge an illegitimate child has been given by its mother for the purpose of adoption by an instrument in writing duly acknowledged and certified as conveyances are required to be certified to entitle them to record in a county of this state, which instrument shall be filed with the consent of the superintendent or managing head of such hospital; but the consent of a parent who has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect, is unnecessary; excepting, however, that where such parents are divorced because of his or her adultery or cruelty, notice shall be given to both the parents personally or in such manner as may be directed by a judge of a court of competent jurisdiction. § 111, *Dom. Rel. Law.*

From superintendent of the poor.

Where the superintendent of the poor has the custody of a child, he is in contemplation of law within the class of orphan

asylums and charitable institutions, and the surrogate may permit the adoption of an infant from such officer. *Matter of Trimm*, 30 Misc. Rep. 493, 63 N. Y. Supp. 952, 7 Ann. Cas. 293.

Adoption of adults.

Until the enactment of chapter 352 of the Laws of 1915, adoption was confined to minors. By that act, for the first time in this State, adoption of a person of the age of 21 years and upward was permitted. In such case no consents, other than that of the person to be adopted and of the foster parent, are required. Section 111 of the Domestic Relations Law, as amended by chapter 352 of the Laws of 1915. Nothing is necessary to effect an adoption of a person over the age of 21 years but a contract between the foster parent and such person, and appearance before the surrogate or county judge, followed by an order of the surrogate or judge, allowing and confirming such adoption, which order must be made if the surrogate or judge is satisfied that the moral and temporal interests of the person to be adopted will be promoted thereby. Sections 111, 112, and 113 of the Domestic Relations Law, as amended by chapter 352, Laws of 1915. So a contract between two adults, allowed and confirmed by the surrogate, without notice to or the knowledge of any other person, may be made to effect a devolution of property on the death of the foster parent, and so accomplish the same result as a valid last will and testament. *Stevens v. Halstead*, 181 App. Div. 198, 168 N. Y. Supp. 142.

An adoption may be abrogated with the consent of the county judge or surrogate as provided in sections 116-118 Domestic Relations Law.

If all parties concerned desire the abrogation, the judge is concerned only with the question of the best interest of the person adopted.

A minor who has been adopted from an orphan asylum or charitable institutions or any one in his behalf may apply for abrogation, whereupon a citation issues and the right and

justice of the matter is determined; a similar proceeding in a like case may be instituted by a foster parent who desires to be relieved of the act of adoption.

Jurisdiction to abrogate adoption.

The County Court and Surrogate's Court having concurrent jurisdiction to permit and abrogate an adoption, an application to abrogate should be made to the court which permitted the adoption, and neither court should take jurisdiction in a proceeding which was begun in the other. *Matter of Trimm*, 30 Misc. Rep. 493, 63 N. Y. Supp. 952, 7 Ann. Cas. 293.

Where the papers upon which the order was made comply with the statute, the surrogate cannot on judicial settlement review the discretion exercised by the officer making the order and set it aside. *Matter of Ward*, 59 Misc. Rep. 328, 112 N. Y. Supp. 282.

Application by foster parent for the abrogation of such an adoption.

A foster parent who shall have adopted a minor in pursuance of this chapter or of any act repealed thereby, from an orphan asylum or charitable institution, may apply to the county judge or surrogate's court of the county in which such foster parent resides, or if the foster parent resides without the state, where the original papers of adoption are on file, or where the natural parent or parents or persons whose consent would be necessary to an original adoption reside, for the abrogation of such adoption on the ground of the wilful desertion of such child from such foster parent, or of any misdemeanor or ill-behavior of such child, which application shall be by petition, stating the grounds thereof, and the substance of the agreement of adoption, and shall be verified by the petitioner; and thereon a citation shall be issued by such judge or surrogate in or out of such court, directed to such child, and to the corporation which was a party to such adoption, or, if such corporation does not then exist, to the superintendent of the poor of such county, requiring them to show cause why such petition should not be granted. Unless such corporation shall appear on the return of such citation, before the hearing thereon shall proceed, a special guardian shall be appointed by such judge or court to protect the interests of such child in such proceeding, and the foster parent shall pay to such special guardian such sum as the court shall direct for the purpose of paying the fees and the necessary disbursements in preparing for and contesting such application on behalf of the child. If such judge or surrogate shall determine, on the proofs made before him, on the hearing of such citation, that the child has

violated his duty toward such foster parent, and that due regard to the interests of both require that such adoption be abrogated, an order shall be made and entered accordingly; and such judge or court may make any disposition of the child which any court or officer shall then be authorized to make of vagrant, truant or disorderly children. If such judge or surrogate shall otherwise determine, an order shall be made and entered denying the petition.

§ 118, *Dom. Rel. Law.*

Abrogation of voluntary adoption.

A person adopted may be deprived of the rights of a voluntary adoption by the following proceedings only:

The foster parent, the person adopted and the persons whose consent would be necessary to an original adoption, must appear before the county judge or surrogate of the county where the foster parent resides, or if the foster parent resides without the state, where the original papers of adoption are on file or where the natural parent or parents or persons whose consent would be necessary to an original adoption reside, who shall conduct an examination as for an original adoption. If he is satisfied that the abrogation of the adoption is desired by all parties concerned, and will be for the best interests of the person adopted, the foster parent, the person adopted, if over the age of twelve years, and the persons whose consent would have been necessary to an original adoption shall execute an agreement, whereby the foster parent agrees, or whereby the foster parent and person adopted, if the latter is above the age of twelve years and thereby a necessary party as above required, agree to relinquish the relation of parent and child and all rights acquired by such adoption, and the parents or guardian of the person adopted or the institution having the custody thereof agree to reassume such relation. The consent of a foster parent who has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect, is unnecessary; excepting, however, that where such parents are divorced because of his or her adultery or cruelty, notice shall be given to both the parents personally or in such manner as may be directed by a judge of a court of competent jurisdiction. The judge or surrogate shall indorse, upon such agreement, his consent to the abrogation of the adoption. The agreement and consent shall be filed and recorded in the office of the county clerk of the county where the foster parent resides, and a copy thereof filed and recorded in the office of the county clerk of the county where the parents or guardian reside, or such institution is located, if they reside, or such institution is located, within this state. From the time of the filing and recording thereof, the adoption shall be abrogated, and the person adopted shall reassume its original name and the parents or guardian of the person adopted shall reassume such relation. A person so adopted, however, may be adopted directly from such foster parents by another person or by either of such foster parents in the same manner as from parents, and as if such foster parents were the parents of such person so adopted.

§ 116, *Dom. Rel. Law.*

Application in behalf of child for the abrogation of an adoption from a charitable institution.

A minor who shall have been adopted in pursuance of this chapter or of any act repealed thereby, from an orphan asylum or charitable institution, or any corporation which shall have been a party to the agreement by which such child was adopted, or any person on the behalf of such child, may make an application to the county judge or the surrogate's court of the county in which the foster parent then resides, or if the foster parent resides without the state, where the original papers of adoption are on file, or where the natural parent or parents or persons whose consent would be necessary to an original adoption reside, for the abrogation of such adoption, on the ground of cruelty, misusage, refusal of necessary provisions or clothing, or inability to support, maintain or educate such child, or of any violation of duty on the part of such foster parent toward such child; which application shall be by a petition setting forth the grounds thereof, and verified by the person or by some officer of the corporation making the same. A citation shall thereon be issued by such judge or surrogate, in or out of such court, requiring such foster parent to show cause why the application should not be granted. The provisions of the code of civil procedure relating to the issuing, contents, time and manner of service of citations issued out of a surrogate's court, and to the hearing on the return thereof, and to enforcing the attendance of witnesses, and to all proceedings thereon, and to appeals from decrees of surrogate's courts, not inconsistent with this chapter, shall apply to such citation, and to all proceedings thereon. Such judge or court shall have power to order or compel the production of the person of such minor. If on the proofs made before him, on the hearing on such citation, the judge or surrogate shall determine that either of the grounds for such application exists, and that the interests of such child will be promoted by granting the application, and that such foster parent has justly forfeited his right to the custody and services of such minor, an order shall be made and entered abrogating the adoption, and thereon the status of such child shall be the same as if no proceedings had been had for the adoption thereof.

After one such petition against a foster parent has been denied, a citation on a subsequent petition against the same foster parent may be issued or refused in the discretion of the judge or surrogate to whom such subsequent petition shall be made.

§ 117, *Dom. Rel. Law.*

Jurisdiction when validity of the adoption is attacked in proceedings to abrogate.

It would seem that where the issues in an abrogation proceeding go to the validity of the adoption itself, the surrogate has not been given jurisdiction to pass upon the questions of fraud and mental incompetency and like matters. Application in such a case should be made to the Supreme Court on account of its full equity jurisdiction.

The Supreme Court may grant relief through its equity power in a case where no notice to the father has been given. *People ex rel. Cornelius v. Callan*, 69 Misc. Rep. 187, 124 N. Y. Supp. 1074. But see *Matter of Livingston*, 151 App. Div. 1, 135 N. Y. Supp. 328.

An equity action may be brought to abrogate the adoption of adults. It is doubtful whether the surrogate has power to abrogate the adoption under section 20, Sur. Ct. A., where fraud or lack of mental capacity is alleged. Cases like *In re Moore*, 72 Misc. Rep. 644, 132 N. Y. Supp. 249 and *In re Johnston*, 76 Misc. Rep. 374, 137 N. Y. Supp. 92, disapproved. See *Stevens v. Halstead*, 181 App. Div. 198, 168 N. Y. Supp. 142.

Second adoption.

After one adoption, a second may be had with the consent of the foster parents. The natural parents have no right to a notice thereof and need not consent. *Matter of MacRae*, 189 N. Y. 142; aff'g, 118 App. Div. 907. See Domestic Relations Law, § 116 as amended by chap. 154, L. 1910.

Idem; jurisdiction to determine as to the validity of an adoption of an infant.

The rights of an infant in the estate of a foster parent may depend whether or not there has been a legal adoption of such infant by the foster parent.

Where such an issue is raised the surrogate has power to determine the question so that he may make a proper disposition of the matter before him.

Under the laws relating to the support of the poor.

In certain cases the surrogate has, as a judge of a court of record, jurisdiction to determine questions regarding the support of the poor in any town in the same manner and with the same affect as the county judge of such county would have.

¶ 23 Jurisdiction of Surrogate's Court to Determine Questions Regarding Marriage, Divorce, Legitimacy of Children, the Relationship of Parties, and Whether They Are Alive or Dead.

The Surrogate's Court with its limited jurisdiction in some respects, has a very wide and comprehensive jurisdiction in others. Dealing as it does with the affairs of the family, it is continually called upon to make decisions which relate to the domestic relations of those families and which are of vital interest to them as members of the community.

The validity of a marriage, and of a divorce, the legitimacy of a child, the degree of relationship which one person bears to another, the validity of an adoption of an infant, the fact as to whether or not a person is alive or dead after a long continued absence, are all questions which affect the family and individual relations of those persons among themselves and in the community.

Such issues arise, not in independent proceedings brought for the purpose of determining them, but in proceedings brought for other purposes in which it becomes necessary to try such issues to enable the surrogate to make a proper decree.

Idem; jurisdiction to determine the validity of a marriage.

When called upon to grant letters of administration or to distribute the property of an intestate or to do any other act which may be affected by the fact as to whether a certain person is or is not legally married, the surrogate may hear the proofs and allegations of the parties and may determine whether or not the alleged marriage is or is not a legal marriage. Such cases will arise where the application of the alleged widow or husband for letters of administration is opposed and the validity of the marriage attacked, or where the property rights of the alleged widow or husband are sought to be enforced, or where the surrogate is called upon to make a decree of judicial settlement.

Common-law marriage between January 1, 1902, and January 1, 1908.

From January 1, 1902, an oral common-law marriage was prohibited, until January 1, 1908, when section 19 of the Domestic Relations Law was repealed. Presumption of marriage from cohabitation begun during that time held not to be sufficient to establish that the petitioner for letters of administration was the widow of the intestate. *Matter of Smith*, 74 Misc. Rep. 11, 133 N. Y. Supp. 730.

Presumption of marriage from cohabitation.

The presumption of marriage from cohabitation apparently matrimonial is one of the strongest presumptions known to the law. This presumption is not to be overcome lightly. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive. *Hynes v. McDermott*, 91 N. Y. 451, 459; *Tracy v. Frey*, 95 App. Div. 579, 88 N. Y. Supp. 874; *Matter of Hinman*, 147 App. Div. 452, 131 N. Y. Supp. 861, aff'd, 206 N. Y. 653.

To presume from the fact of cohabitation, that there has been an actual marriage, it must be matrimonial, and be so begun. It is not the fact alone, but the character of the fact which should be considered. *Brinkley v. Brinkley*, 50 N. Y. 184, 198; *U. S. Trust Co. v. Maxwell*, 26 Misc. Rep. 276, 57 N. Y. Supp. 53.

Cohabitation unlawfully begun.

The mere continuance of unlawful cohabitation after the death of the real wife would not lay a foundation for presuming marriage. There must be evidence showing that the character of the connection had changed, but that testimony is not limited to evidence of a ceremonial marriage. *Hyde v. Hyde*, 3 Bradf. 518; distinguished in 32 N. Y. St. Repr. 996, 11 N. Y. Supp. 748.

Very often the changed character of the cohabitation is indicated by facts and circumstances which explain the cause and locate the period of the change, so that in spite of the,

illicit origin the subsequent intercourse is deemed matrimonial. *Badger v. Badger*, 88 N. Y. 546, 554.

Where the intercourse was illicit at first, but was not then accompanied by any of the evidences of marriage, and subsequently it assumes a matrimonial character, and is surrounded by the evidences of a valid marriage, a question of fact arises as to whether from all the circumstances there is sufficient evidence of marriage. *Gall v. Gall*, 114 N. Y. 103, 118.

Notwithstanding cohabitation existed before the death of the wife of a man, marriage from the date of such death may be found from matrimonial relations if the woman was ignorant of the existence of the prior wife. *Townsend v. Van Buskirk*, 33 Misc. Rep. 287, 68 N. Y. Supp. 512; *Matter of Wells*, 123 App. Div. 79; aff'd, 194 N. Y. 548.

Proof by widow of marriage.

Where a party proves declarations of the deceased that his alleged widow was not his wife, it is competent for her to testify to personal transactions with deceased. *Matter of Schœuer*, 5 Dem. 369.

Validity of marriage under the "five year act."

Voidable marriages. A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

* * * * *

5. Has a husband or wife by a former marriage living, and such former husband or wife has absented himself or herself for five successive years then last past without being known to such party to be living during that time.

§ 7, *Dom. Rel. Law*.

In *Gall v. Gall*, 114 N. Y. 109, 120, Vann, J., in considering this statute, says: "The section quoted seems to be based upon the probability that the absentee is dead, and is apparently designed to protect the person who, in good faith, acts upon the statute, from evil results if the absentee is actually living. The first marriage is suspended, or, as was held in *Griffin v. Banks* (24 How. 213), it is 'placed in abeyance,' but it is not reinstated by the return of the absentee, because the

second marriage becomes void only from the time it is so declared by a competent court. Otherwise, both marriages would be in force at the same time and, to this extent, polygamy would be sanctioned by law. The first marriage ceases to be binding until one of the three parties to the two marriages procures a decree pronouncing the second marriage void. (Code of Civ. Pro., § 1745.) A statute with such possibilities should be so construed as to promote good order, and the person availing himself of its privilege should be required to act in perfect good faith. (*Jones v. Zoller*, 32 Hun, 280; *Cropsey v. McKinney*, 30 Barb. 47; *McCartee v. Camel*, 1 Barb. Ch. 455.)”

In *Matter of McKinley*, 66 Misc. Rep. 126, 122 N. Y. Supp. 807, the second marriage was recognized as valid and as entitling the alleged widow to share in the estate of the deceased second husband, although the first husband had returned.

Marriage after a husband has been absent for five years, contracted in good faith after effort made to find him, is valid until set aside by such absent husband. *Matter of Del Genovese*, 56 Misc. Rep. 418; 107 N. Y. Supp. 1033; aff'd, 136 App. Div. 894, 120 N. Y. Supp. 1121.

Good faith and active diligence required.

Knowledge within the true meaning of the statute involves all that a person of ordinary prudence would have discovered under like circumstances by an inquiry conducted in good faith with the diligence required by the importance of the subject. The inquiry must be made with an honest effort to find out the truth, not to overlook it so as to be able to testify that nothing was discovered. A careless or dishonest inquiry affords no protection. *Gall v. Gall*, 114 N. Y. 109, 121; *Matter of Tyler*, 80 Hun, 406; *Stokes v. Stokes*, 198 N. Y. 301; rev'g, 128 App. Div. 838.

Marriage in another State.

Marriage after an absence is valid by our statute, but not by the common law, therefore proof should be made of a simi-

lar statute in the State where the second marriage took place. *Matter of Kutter*, 79 Misc. Rep. 74, 139 N. Y. Supp. 693.

Jurisdiction to determine the validity of an alleged divorce.

Closely allied to the question as to the validity of a marriage, is that of the validity of a divorce.

Where it is alleged that a husband or widow who applies for letters of administration is not entitled to them by reason of a divorce granted to either of the parties the surrogate may determine the validity of such a divorce.

On the distribution of an estate it is sometimes necessary to determine the legality and effect of an alleged divorce and the surrogate has the necessary power to pass upon and determine such question to the end that he may make a proper order or decree in the premises.

Effect of judgment of another court.

In the leading case of *Ferguson v. Crawford* (70 N. Y. 253), Judge Rapallo examined with characteristic care and ability the whole question of the force and effect of judgments. After stating the then well-established rule in regard to judgments of sister States, that the question of jurisdiction may be inquired into, and a want of jurisdiction over the person shown by evidence, he says: "When we come to consider the effect of these authorities, it is difficult to find any solid ground upon which to rest a distinction between domestic judgments and judgments of sister States in regard to this question. * * * In holding, therefore, that a defense that the party was not served and did not appear, although the record stated that he did, was good, our courts must have held that such is the law of this State and the common law; and consequently that in the absence of proof of any special law to the contrary in the State where the judgment was rendered, it must be presumed to be also the law of that State. The judgments of our courts can stand on no other logical basis."

In *O'Donoghue v. Boies* (159 N. Y. 87), Judge O'Brien

said: "In case of judgments recovered in the courts of other States, which are to be given full faith and credit here under the Federal Constitution, the record may be impeached for want of jurisdiction even by extrinsic evidence, and the same is true with respect to domestic judgments. * * * These propositions have been settled in this court once for all in the case of *Ferguson v. Crawford* (70 N. Y. 253). In the opinion by Judge Rapallo, which covers the whole field of discussion, the positions stated are sustained by a weight of argument and a wealth of illustration which leaves nothing further to be said on the subject." Numerous cases are cited, following and approving *Ferguson v. Crawford*.

Therefore, it seems clear that the surrogate has the same power to pass upon the question of whether the court had jurisdiction in regard to domestic judgments that the Court of Appeals has directly decided that he has in regard to the judgments of sister States.

As stated in *O'Donoghue v. Boies* (*supra*): "There is but one solitary exception to this rule, and that is in a case where jurisdiction depends on a fact that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction. Then the question of jurisdiction is judicially decided, and the judgment record is conclusive on that question until set aside or reversed by a direct proceeding. (*Ferguson v. Crawford, supra*, at p. 265.) The record in the annulment suit shows that witnesses were called for the plaintiff and examined upon the question of the service of the summons. I do not think that fact brings the case within the exception. It was a trial on default. There was no appearance, no answer, no witnesses for the defense, and no cross-examination. I do not think the fact was 'litigated' within the meaning of the rule. If so, it would have been a 'litigated fact' upon the affidavit of service alone, and hence the question could never arise in a collateral proceeding." *Matter of McGarren*, 112 App. Div. 503, 98 N. Y. Supp. 415.

It is directly settled by the Court of Appeals that, upon

such a proceeding, the surrogate has the power to take extrinsic evidence as to the jurisdiction of the court of a sister State, and finding said court had not acquired jurisdiction, to treat the judgment so obtained as a nullity.

A foreign divorce granted upon grounds not recognized in this State, may yet be recognized by our courts as valid if there has been personal service and an appearance by the defendant. *Matter of Higgins*, 68 Misc. Rep. 259, 124 N. Y. Supp. 1005.

Jurisdiction to determine validity of foreign divorce.

In a proceeding to revoke letters of administration where an issue is raised as to whether a widow has lost her right to administer by reason of a divorce or decree annulling marriage, the surrogate has jurisdiction to determine whether the court rendering the judgment or decree had jurisdiction, and that too whether the court granting the judgment be a domestic or foreign one. *Matter of McGarren*, 112 App. Div. 503, 98 N. Y. Supp. 415.

In *Kerr v. Kerr* (41 N. Y. 272), there was a proceeding before the surrogate to revoke letters of administration. An Indiana judgment of divorce was submitted and extrinsic evidence of want of jurisdiction received. Judge Grover said: "The counsel for the appellant insists that it having appeared from the evidence that to determine which of the parties was the wife and widow of the intestate, it was necessary to inquire into and pass upon the validity of a judgment divorcing the intestate from the respondent, rendered by a Circuit Court of the State of Indiana, it was not competent for the surrogate to decide that question, and that he should have dismissed the proceeding. In this position I do not concur. The statute expressly empowers the surrogate to determine the truth or falsity of the allegations upon which the letters were issued. This includes the power to decide every incidental question necessary for that purpose, whether such question be one of fact or law." And the surrogate was sus-

tained in revoking her letters upon the ground of the invalidity of the Indiana divorce established by extrinsic evidence.

In *Matter of Kimball* (155 N. Y. 62), there was an appeal from an order of the Appellate Division affirming a decree of the surrogate denying a petition for the removal of administrators and for the appointment of petitioner. The proceeding turned upon the validity of a North Dakota divorce. The surrogate determined the judgment invalid and was affirmed, Judge Haight saying: "It is equally well settled that the judgment of a court of a sister State has no binding effect in this State, unless the court had jurisdiction of the subject matter and of the person of the parties, and that want of jurisdiction may always be interposed against a judgment when it is sought to be enforced, or when any benefit is claimed for or under it. * * * Such a judgment is void and of no force or effect in this State," citing among other authorities *Kerr v. Kerr* (*supra*).

The Surrogate's Court may inquire into the validity of a judgment of divorce rendered in another State. *In re Akin's Est.*, 89 Misc. Rep. 690, 152 N. Y. Supp. 310.

Jurisdiction to determine legitimacy of children.

Whenever it becomes necessary in order to grant letters of administration or to distribute an estate to determine as to the legitimacy of any alleged children of the deceased, the surrogate has all necessary power to hear the evidence and determine such question

The effect of a void and a voidable marriage upon the legitimacy of children considered. *Houle v. Houle*, 100 Misc. Rep. 28, 166 N. Y. Supp. 67.

Burden of proof.

The presumption of fact of legitimacy is one of the strongest known to the law, and of course it cannot be overthrown except by evidence which is stronger. The burden of proof is on the party asserting illegitimacy, and the rule has been declared to be "that to bastardize the issue of a married woman,

it must be shown beyond all reasonable doubt that there was no such access as could have enabled the husband to be the father of the child. *Cross v. Cross*, 3 Paige 139; *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375; *Caujolle v. Ferrière*, 23 N. Y. 90; *Matter of Matthews*, 153 N. Y. 443; *Mayer v. Davis*, 119 App. Div. 96; rearg. 122 App. Div. 393.

Child of second marriage legitimate.

When a woman contracts a second marriage in good faith, relying upon five years' absence of her former husband, a child by the second husband is legitimate although born before such second marriage was solemnized. *Matter of Del Genovese*, 56 Misc. Rep. 418, 107 N. Y. Supp. 1033; aff'd, 136 App. Div. 894, 120 N. Y. Supp. 1121.

Presumption of marriage and legitimacy.

In *Hynes v. McDermott* (10 Daly, 423), the presiding justice of this court reviewed the authorities and deduced therefrom a conclusion expressed in these words: "The result of an examination of these authorities seems to establish the conclusion that where the validity of a marriage and the legitimacy of children is in question, no presumption (that is founded upon any evidence whatever), in which a jury indulges for the purpose of arriving at a verdict in favor of such marriage and legitimacy will be disturbed by the court." This case went to the Court of Appeals (91 N. Y. 451), where the judgment was affirmed. Judge Andrews, in delivering the opinion of the court, said: "The presumption of marriage, from a cohabitation, apparently matrimonial, is one of the strongest presumptions known to the law. This is especially true in a case involving legitimacy. The law presumes morality and not immorality; marriage and not concubinage; legitimacy and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence."

Where it is admitted that the cohabitation of the parties is

illicit in its origin, the presumption is that it so continues and before it can be characterized as a lawful relation proof is required of such acts and circumstances as indicate that the relation has ceased to be illicit and become matrimonial. It was said by Judge Vann in *Gall v. Gall* (114 N. Y. 109), in speaking upon this subject: "It is sufficient if the acts and declarations of the parties, their reputation as married people, and the circumstances surrounding them in their daily lives, naturally lead to the conclusion that, although they begin to live together as man and mistress, they finally agreed to live together as husband and wife." It can be said without fear of successful contradiction that the rule above quoted is the settled law of this State and it is not to be departed from or the rightful presumptions disregarded, unless the illegitimacy be established by clear and irrefragable proof. Webster's International Dictionary defines irrefragable to mean "not to be refuted or overthrown; unanswerable; incontestable; undeniable." *Tracy v. Frey*, 95 App. Div. 579, 88 N. Y. Supp. 874.

Effect of marriage of parents upon illegitimate children.

Under the common law, the legitimacy or illegitimacy of a person was determined by the law of the country in which he was born. If by the law of that country he was legitimate, he should be deemed legitimate everywhere. If, however, by that law he was illegitimate, then he should be deemed illegitimate in every other country. There were some exceptions; for instance, if the parents were citizens or representatives of some foreign country, passing through or temporarily staying in the country of the birth. In some of the countries of Europe there were laws under which illegitimate children became legitimate by the subsequent marriage of their parents. This was the case in France, and its courts consequently held that a child born out of wedlock in its country became legitimate by a subsequent marriage of its parents, although the marriage took place in England where a different law pre-

ailed, and where a subsequent marriage would not have the effect of rendering the child legitimate.

In this State the law is now settled in accordance with the French rule, that when an illegitimate child has by the subsequent marriage of his parents become legitimate by virtue of the laws of the State or country where such marriage took place and the parents were domiciled, he is thereafter legitimate everywhere and is entitled to all of the rights flowing from that status, including the right to inherit, notwithstanding the fact that he was born in another country. *Miller v. Miller*, 91 N. Y. 315.

Recently many of our sister States have adopted statutes similar to those of France, providing that the subsequent marriage of the parents legitimized the child or children previously born. Such a statute was adopted in this State in 1895. But the statute to which we refer, only relates to such marriages between parents as may be lawfully made, and not to those which are polygamous, incestuous, or are prohibited by law.

Where therefore a divorce is obtained in another State, while the husband or wife remains a resident of this State and is not served with process, for a cause not recognized as ground for such divorce in this State, a marriage in the State where such divorce was obtained cannot be recognized here as legitimizing children theretofore born so as to give them property rights under our laws. *Olmsted v. Olmsted*, 190 N. Y. 458; revg. 118 App. Div. 69, which revd. 51 Misc. Rep. 309.

Effect of dissolution or annulment of marriage upon legitimacy of children.

Consult Civil Practice Act § 1135.

Jurisdiction to determine the relationship of one person to another.

The proper disposition of an estate often depends upon the question as to who are the next of kin. To enable the surrogate to determine such questions he may take the evidence of

the parties and determine the relationship which one person bears to another.

Evidence of relationship by proof of pedigree.

Pedigree is the history of family descent which is transmitted from one generation to another by both oral and written declarations, and unless proved by hearsay evidence not competent in general issues it cannot, in most instances, be proved at all. Matters of pedigree consist of descent and relationship evidenced by declarations of particular facts such as births, marriages and deaths. In such cases hearsay evidence of declarations of persons, who from their situation are likely to know, is admissible when the person making the declaration is dead. Before these declarations can be received as evidence, however, it must appear that the person making them was a member of the family whose descent is sought to be traced. Only slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy. *Young v. Shulenberg*, 165 N. Y. 385, 388; *Eisenlord v. Clum*, 126 id. 552, 563; *Fulkerson v. Holmes*, 117 U. S. 389, 397.

Cases of pedigree are peculiar in that they depend almost exclusively upon presumption, which is a process of probable reasoning from facts established or judicially noticed, and the weight to be given this character of evidence depends upon the facts surrounding each particular case.

From the nature of the case a question of pedigree forms an exception to the general rule as to the proof of a particular fact by hearsay, reputation or tradition; and, in addition to the declarations of deceased persons who were likely to know, unauthenticated facts and entries, made presumably with no motive to deceive, such as an entry in a family bible, an inscription on a tombstone, a pedigree hung up in a family mansion, and recitals in deeds, are competent evidence upon that issue. *Jackson v. Cooley*, 8 Johns. 128, 131; *Layton v. Kraft*, 111 App. Div. 842, 845.

Declarations as to pedigree.

Declarations as to pedigree are competent only in case the declarant is proved by evidence *dehors* his own declarations to be a member of the family by blood or affinity. *In re Perkins*, 174 App. Div. 191, 160 N. Y. Supp. 54; *Aalholm v. People*, 211 N. Y. 406

Proof of relationship.

Relationship may be proved by general reputation in the family by a witness who is connected with the family, but not by a witness not connected with the family who has not any personal knowledge of the matter or direct information from a member of the family. *McCreedy v. Garbutt*, 6 Dem. 252.

To prove pedigree and marriage, hearsay and traditionary evidence is received from necessity. *Chamberlain v. Chamberlain*, 71 N. Y. 423.

Identity of name.

Identity of name raises a presumption of identity of person where there is similarity of residence, or trade, or circumstances, or where the name is an unusual one. Identity of name is *prima facie* evidence of identity of person. *People v. Snyder*, 41 N. Y. 397, 403; *Hatcher v. Rocheleau*, 18 id. 86; *Mahaney v. Mutual Reserve Assn.*, 69 Hun, 12, 16, 52 N. Y. St. Repr. 549; *Trebilcox v. McAlpine* 46 Hun, 469, 473, 11 N. Y. St. Repr. 847; *Spotten v. Keeler*, 12 N. Y. St. Repr. 385, 22 Abb. N. C. 105. In a case of identity of name the presumption arises from the improbability that different persons have the same name, and, therefore, the *onus* is cast upon the party denying the identity to show that the name relates to a different person. *People ex rel. Haines v. Smith*, 45 N. Y. 772, 779. Mere misspelling of a name, where there is not such difference as to make it a distinct name, does not affect the identity of the person. *Jackson v. Boneham*, 15 Johns 226; *Jackson v. Cody*, 9 Cow. 140, 147.

Proof of identity of persons by similarity of appearance and habits.

Proved coincidences that two men had identity of name; were reticent about family history; had general similarity of stature; each had early association with Albany and Troy; resided on a certain street in New York about the same time were overcome by other proof showing a great difference of mental condition and social status.

Personal likeness.

Parties who are claimed by one of them to be related may be observed to ascertain a physical likeness, but such evidence is of little value. *Matter of McGerry*, 75 Misc. Rep. 98; 134 N. Y. Supp. 957, where Surrogate Fowler discusses many questions relating to proof of relationship.

Jurisdiction to construe ante-nuptial agreements.

The validity and effect of an ante-nuptial agreement must often be determined in order to make a decree of distribution. When such an agreement is not attacked, if offered it may be received in evidence and given effect to in accordance with its terms and conditions; it sometimes controls in determining with what property an executor or administrator shall be charged and to whom property shall be distributed; it may also become of importance where a testator leaves no lineal descendants and gives by will more than one-half of his property to religious societies.

See decree of judicial settlement, ¶ 445.

CHAPTER VI.

Special Proceedings; Pleadings and Process; Papers, Filing, Authenticating and Serving.

- ¶ 24. § 48. Special proceedings, how commenced; statute of limitations.
Effect of death of a party, and of failure to serve citation.
Method of service to save statute of limitations.
- ¶ 25. § 49. Written pleadings required.
- § 50. Verification of papers.
- § 51. General contents of petition.
Answers, objections and claims.
Papers, filing, indorsing, entering.
Authentication of papers, judgments and affidavits.
Service of papers upon attorney, and through post-office.
Computation of time for service and publication.
Supplying and amending papers.
- ¶ 26. § 52. Process, how executed and returnable.
Citation, warrant of attachment, order to show cause.
- § 53. General contents of citation.
Return day, how fixed.
- § 54. Citation where persons constitute a class, or are wholly or partly unknown.

¶ 24 Proceeding Begun by Filing Petition; Effect Upon Statute of Limitations.

Proceeding commenced by petition; statute of limitations.

Every proceeding in surrogate's court shall be commenced by the filing of a petition. In any case where the time in which to begin such proceeding is limited, a citation, or an order to show cause, on such petition must, within sixty days thereafter, be issued and be served, as prescribed in this act upon the adverse party, or upon one of two or more adverse parties, who are jointly liable, or otherwise united in interest; or, within the same time, the first publication thereof must be made pursuant to an order made as prescribed in this act.

§ 48, *Sur. Ct. A.* Former § 2518, *Code Civ. Pro.*

A proceeding is begun by the filing of a petition, but to be a protection against a statute of limitations, the filing of the petition must be followed by the service or attempted service of a citation or order to show cause. The language of the amendment is somewhat different from the language of the former section under which it was held in such cases as *Mat-*

ter of Bradley, 70 Hun, 104, and *Matter of Van Vleck*, 32 Misc. Rep. 419, 66 N. Y. Supp. 727, that the time began to run from the issue of citation, and not from the date of filing of the petition. Under the amendment it clearly begins, from the filing of the petition.

Effect of failure to serve citation. See ¶ 6.

Where a citation is issued but not properly served, a supplemental citation may issue and the proceeding will not fail for lack of service of the original citation. *Matter of Bradley*, 70 Hun, 104, 53 N. Y. St. Repr. 540, 23 N. Y. Supp. 1127; *Matter of Gouraud*, 95 N. Y. 256, revg. 28 Hun, 560.

The statute contemplates that the petition shall be filed and that within sixty days thereafter the citation shall be both issued and served, or an attempt made to serve it. Where a petition for settlement is filed, and an account filed showing the allowance of claims of creditors, the statute of limitations will not run against the claims of the creditors, although citation is not issued for many years. The condition is similar to a deposit of the fund in court for the benefit of the persons entitled thereto. *Matter of Hannon*, 46 Misc. Rep. 229, 93 N. Y. Supp. 207.

Cases overruled.

Fountain v. Carter, 2 Dem. 313; dist'd, 11 N. Y. St. Repr. 695; foll'd, 9 N. Y. Supp. 459; *Matter of Soule*, 6 Dem. 137, 11 N. Y. St. Repr. 695; *Matter of Clapp*, 1 Dem. 387.

United in interest.

“United in interest” means identity of interest or joint interest as distinct from similarity or community of interest. *Fountain v. Carter*, 2 Dem. 313.

Continued jurisdiction. See ¶ 6.

A proceeding begun by the service of a citation issued upon the presentation of a petition is a special proceeding. As such it is not thrown out of court by a failure to adjourn it to

a definite day. *Gilman v. Gilman*, 1 Redf. 354. The Surrogate's Court having once acquired jurisdiction retains it until the proceeding has been finally disposed of by a decree or regularly discontinued. *Matter of Spreen*, 1 Civ. Pro. Rep. 375.

Attempt to commence an action in a court of record. See § 17 Civil Practice Act.

Effect of death of party.

In the event of the death of a party named in the petition, his representatives should be brought into the proceeding, either by the issue and service of a supplemental citation or by his voluntary appearance.

Party dying after issue and before service of citation. No jurisdiction is acquired of his representative by service of the original citation in which such representatives are not named. *Matter of Georgi's Estate*, 35 Misc. Rep. 685, 72 N. Y. Supp. 431; *Boerum v. Betts*, 1 Dem. 471.

Where a party dies after issue of citation to him, his legal representative may be brought in by supplemental citation, or he may apply for leave to be made a party. There seems to be no provision for bringing in his next of kin in the absence of a legal representative, unless they may be brought in as "interested parties," but it is urged by some that interested parties means only those interested in the original estate. *Matter of Morgan*, 1 Misc. Rep. 71, 54 N. Y. St. Repr. 236, 22 N. Y. Supp. 1064.

¶ 25 Written and Verified Pleadings Required; Contents of Petitions, Answers and Objections; Indorsing, Filing and Entering Papers.

Written pleadings required.

All petitions, answers, and objections shall contain a plain and concise statement of the facts constituting the claim, objection or defense, and a demand for the decree, order, or other relief, to which the party supposes himself to be entitled, and shall be duly verified. The surrogate may require that a copy

thereof be served upon any person interested in such manner as he may direct. A party who fails to comply with such requirement may be treated as a party in default. § 49, *Sur. Ct. A. Former § 2519, Code Civ. Pro.*

All petitions, answers, and objections are required to be in writing and verified.

Probably the reason why all pleadings in Surrogates' Courts were not required to be verified originally was that early in its history it was not a court of record. By requiring all petitions and answers to be verified, the same may be regarded as proof, when not controverted. See § 76, ¶ 32.

Verification thereof.

The provisions of law relating to the verification of a pleading in a civil action in the supreme court apply to a verification made pursuant to this act, and to the petition or other paper so verified, where they can be so applied in substance, without regard to the form of the proceeding.

§ 50, *Sur. Ct. A. Former § 2520, Code Civ. Pro.*

A verification is good which is signed by two persons although the name of one is omitted at the beginning of the affidavit of verification. *Matter of Ireland*, 47 Misc. Rep. 545, 95 N. Y. Supp. 1079.

A verification which states that the petitioner "knows the contents thereof and that the same are true" is a substantial compliance with the section. *Matter of Macaulay*, 94 N. Y. 574; *aff'g*, 27 Hun, 577.

Verified out of the state.

A pleading, oath or affidavit to be used in an action or special proceeding as evidence, and verified without the State, must be certified in the manner required to entitle a deed to be recorded in this State, and if not is to be treated as unverified and fails to give jurisdiction. *Phelps v. Phelps*, 6 Civ. Pro. R. 117.

If taken within the State verification need not be certified.

In order that a petition be considered as "duly verified" it should have attached, when executed out of the State, a certificate showing among other things that the officer before whom

it was verified had authority to take and certify the acknowledgment and proof of deeds. *Matter of Wisner*, 3 Dem. 11.

Verified by attorney. Practice Rule 99.

A petition may be verified by the attorney for the party making it, where all the material facts are within the knowledge of the attorney. *Matter of Mahoney*, 88 App. Div. 140, 84 N. Y. Supp. 329; *aff'g*, 37 Misc. Rep. 472, 75 N. Y. Supp. 1056; *Moorhouse v. Hutchinson*, 2 Dem. 429; *Matter of Ries*, 170 App. Div. 951, 155 N. Y. Supp. 1136.

Sufficiency of verification of an affidavit.

An affidavit or acknowledgment may be sworn to before a notary of another State, and if properly authenticated will be received in this State, provided such notary was authorized by law in his own State to take the acknowledgment or proof of deeds to be recorded therein. By reason of the amendment of the Real Property Law, the case of *Turtle v. Turtle* (31 App. Div. 49, 52 N. Y. Supp. 857), is no longer controlling. *Isman v. Wayburn*, 54 Misc. Rep. 86, 104 N. Y. Supp. 491.

Every affidavit should show upon its face that it was taken within the jurisdiction of the officer who certifies it. *Robinson v. Cooper*, 62 Misc. Rep. 517, 115 N. Y. Supp. 599.

When taken out of the State the affidavit should have a certificate from the clerk or other proper authority showing that the officer has authority in that State to take the acknowledgment and proof of deeds. See § 359, Civ. Pr. Act; *Levy v. Levy*, 29 Misc. Rep. 374; *Matter of Wisner*, 3 Dem. Sur. 11.

General contents of petition.

A petition must substantially set forth:

1. The title of the proceeding, the name and residence of the person to whose estate or fund the proceeding relates, and the name and residence of the petitioner.
2. The facts upon which the jurisdiction of the court depends to entertain the application and grant the relief asked for.
3. So far as they can be ascertained with due diligence, the names and post-office addresses of all the persons interested in the proceeding who are required

to be cited upon the application, or concerning whom the court is required to have information; and if the name or post-office address of any of such persons is unknown, the facts which show what effort has been made to ascertain the same.

4. That there are no other persons than those mentioned interested in the application or proceeding.

5. A request for the relief or action of the court to which the petitioner deems himself entitled.

Before any process shall be issued on a petition the petitioner may be required to show by his petition or otherwise the following matters:

If any person named be an infant there shall be set forth:

a. His age, and whether or not he has a general or testamentary guardian.

b. Whether or not his father, or if he be dead, his mother is living, giving the name and post-office address of such person.

c. The person with whom such infant resides and his post-office address.

If any person named be an adjudged, or an alleged, incompetent there shall be set forth:

a. The name and post-office address of the committee, if any, and the name and post-office address of the person or institution having the care or custody of such incompetent.

b. The facts regarding his incompetency, and the name and post-office address of a relative or friend having an interest in his welfare.

If any of such persons be included in a class, and his name be unknown there shall be set forth:

The names and post-office addresses of those persons of the class who are known, and a general description of all other persons belonging to such class, showing their connection with the decedent or fund and their interest in the property or matter in question.

If any of such persons be unknown or his name be unknown there shall be set forth:

A general description of such person showing his connection with the decedent or fund, and his interest in the property or matter in question.

§ 51, *Sur. Ct. A. Former § 2521, Code Civ. Pro.*

It will be noticed that only the first 5 requirements are jurisdictional. The remainder of the section shows what should be in a petition to enable the surrogate to act intelligently.

Importance of a carefully drawn petition.

A special proceeding is begun by the filing of a petition (¶ 24), which must set forth all of the facts to enable the surrogate to acquire jurisdiction of the subject matter.

The petition is the most important paper in a special proceeding, since only by it does the court acquire jurisdiction of

the subject matter. Before preparing it the attorney should have a full knowledge of the facts of his case, and a thorough understanding of what facts it is necessary to set up to give the court jurisdiction of the proceeding. He should consult this section to find out what must be alleged generally in all petitions, and then the sections of the act under which he brings his proceeding to ascertain what additional facts must be set up to give jurisdiction of that particular proceeding.

It will be noticed in this section (51) there are several requirements which are not jurisdictional, but which the surrogate may insist upon being observed in drawing a petition, which matters are necessary to be known by him to enable him to issue the proper citation. These matters if set forth in the petition, need not be specially proved upon the hearing, or by subsequently filed affidavits or oral proof, unless controverted by answer or objection. See § 76, ¶ 32. By making the petition full and complete as to all these matters, the relief asked for may often be obtained on the allegations of the petition.

If the jurisdictional facts exist and they are set forth in the petition even in an informal manner, the surrogate will acquire sufficient jurisdiction of the subject matter to enable him to issue the process and to grant the relief asked for where a proper case has been made.

The petition should be subscribed by the petitioner and should be verified by him and should be filed with the clerk of the court.

Petition not necessary as means of presenting new facts.

A petition is necessary for the purpose of instituting a proceeding, but where, after the proceeding is begun, new facts need to be presented, such as the death of a party, or devolution of interest, or an omission of a proper party, and many other matters, they may be presented by an affidavit or by oral testimony, and no new petition setting up such facts need be filed.

Amendment of petition.

The modern tendency has been to afford litigant's every possible opportunity, if seasonable application be made, to put their pleadings into such form as they consider will best present their contention as to the questions at issue. This practice tends to promote the ends of justice and to prevent the doing of injustice through technical or inadvertent errors of pleading.

An application to amend the petition which changes the allegation as to the residence of the deceased should be allowed. *Matter of Rubens*, 117 App. Div. 523, 102 N. Y. Supp. 795.

Sufficiency of allegation in petition where not controverted.

Unless there is a special requirement that an affidavit or other evidence shall accompany the petition, the allegations therein made are to be taken as true and sufficient to establish the jurisdictional facts. *Pumpelly v. Tinkham*, 23 Barb. 321; *Bolton v. Schriever*, 135 N. Y. 65; *Van Gaasbeek v. Staples*, 85 App. Div. 271, 83 N. Y. Supp. 225. See § 76, ¶ 32.

Where allegations of the petition are put in issue.

Where the right of the petitioner to institute the proceeding is properly challenged by putting in issue the material allegations in that regard, the surrogate should take evidence and make his decision. *Matter of Bedford*, 130 App. Div. 642, 115 N. Y. Supp. 472.

Petition should set out individual names composing partnership.

Where a firm or copartnership has presented a claim or is to be made a party, the petition should set forth the names of the partners as composing such firm. A partnership has no legal entity, and cannot sue or be sued as such. *Haskins v. D'Este*, 133 Mass. 356. A firm is only a collection of individuals and their firm name is used only for commercial convenience. *The Bank of Buffalo v. Thompson*, 121 N. Y. 280; *Jones v. Blun*, 145 id. 333.

Answers, objections and claims.

An answer may be made upon the return day of the citation to any petition which has been filed.

It should be in writing, should be signed by the party making it, and should be verified.

It should set forth any defense to the allegations of the petition.

Where an infant is a party who desires to make an answer, such answer should be made by the special guardian of the infant, who will be appointed upon the return day of the citation.

Reply.

No reply to an answer or to objections is contemplated or provided for in Surrogate's Court, and therefore the petitioner may avail himself of all defences which he properly has, and it can not be held that he has waived any of such defences by his failure to reply. *In re Hearne*, 171 N. Y. Supp. 984.

Objections.

Objections are in effect equivalent to answers, but are interposed to an account filed upon an accounting and to an application for probate or to other papers filed.

It often happens that there is no reason to file an answer to a petition, since in ordinary cases it does not allege more than the jurisdictional facts, but when further proceedings are taken objections may be properly filed.

It is not a good objection to an item in an account that the objectant alleges that he has no knowledge or information sufficient to form a belief, etc., as that form of objection is not authorized by sections 49 and 210 of the Surrogate's Court Act. *In re Brommer's Est.*, 105 Misc. Rep. 336, 173 N. Y. Supp. 200.

Claims. See ¶ 213.

The term "claim" usually refers to a demand which is made upon an executor or administrator for the payment of a debt due from the deceased to the claimant.

A claim may be presented at any time and consists of a statement of an account, claim, or demand and should be accompanied by an affidavit of the claimant that the debt is actually due and owing from the deceased to the claimant and that no payments have been made thereon except those specified in the claim and that there are no offsets to the same.

Bill of particulars.

The surrogate may in a proper case grant a bill of particulars. The same rules govern him in this regard as govern other judges of courts of record. *Matter of Brown*, 182 N. Y. Supp. 728; *Matter of Seymour*, 182 N. Y. Supp. 726.

Denial of the factum of the will and an allegation of lack of testamentary capacity, do not warrant granting a bill of particulars as to them.

With respect to allegations of fraud and undue influence, a bill of particulars may be granted. *Matter of Ross*, — Misc. Rep. —, 187 N. Y. Supp. 558. This is not compelling the contestants to furnish their evidence as in the case of *Smidt v. Bailey*, 132 App. Div. 177, 116 N. Y. Supp. 805, where the complaint stated the name of the person charged with practicing the fraud and undue influence, and in which the court denied a bill as to all other items. Restricting the bill as above accords with the few decisions on the subject. *Estate of Mary A. Halloran*, N. Y. Law Journal, April 29, 1916; *Estate of Adelena M. Cramer*, N. Y. L. J., Nov. 14, 1916; *Estate of Mary E. Brown*, 182 N. Y. Supp. 728; *Estate of Marie L. Emmons*, N. Y. L. J., Jan. 8, 1920.

Indorsing, filing and entering papers in special proceedings.

Rule 11 of Civil Practice requires that all papers served or filed must be indorsed or subscribed with the name of the attorney or attorneys, or the name of the party, if he appears

in person, and his or their office address, or place of business, applies to decrees and orders. *De Lamater v. Havens*, 5 Dem. 53.

Filing papers in special proceedings.

All papers used in a special proceeding before the surrogate must be filed with the clerk of the Surrogate's Court.

Filing papers in New York county.

Where all parties waive citation, all papers must be filed two days before the day fixed for the hearing. Rule 4, N. Y. Co. Surrogate.

Authentication of papers for use in surrogate's court.

Whenever in this act a paper or instrument is required to be "acknowledged, or proved, and duly certified," the same shall be acknowledged or proven in the same manner as a deed is required to be acknowledged or proved and certified to be recorded in that county, except that when executed within the state of New York, no certificate of the county clerk shall be required.

Subd. 15, § 314, Sur. Ct. A. Former § 2768, subd. 15, Code Civ. Pro.

Acknowledgments and proofs within the state.

The acknowledgment or proof of a conveyance of real property within the state may be made at any place within the state, before a justice of the supreme court; or within the district wherein such officer is authorized to perform official duties, before a judge, clerk, deputy clerk, or special deputy clerk of a court, a notary public, an official examiner of title, or the mayor or recorder of a city, a justice of the peace, surrogate, special surrogate, special county judge, or commissioner of deeds, except that such an acknowledgment or proof of a conveyance may be taken by a justice of the peace anywhere within the county containing the town or city in which he is authorized to perform official duties.

§ 298, *Real Property Law*.

Certificates on acknowledgments taken out of the state.

It is not sufficient to state in a certificate attached to an acknowledgment taken out of the State that the notary public or other officer, was "authorized to take the same," for such statement is not equivalent to saying that the officer is authorized to take the acknowledgment of a deed, and unless the certificate shows that the officer is qualified to take acknowledgments of deeds it is not sufficient under section 41 of the Civil

Practice Act. *Matter of Wilcox*, 48 St. Rep. 549; *Bowen v. Stilwell*, 9 Civ. Pro. Rep. 281. See "Forms" for such certificate.

Authentication of acknowledgments taken in other states and countries.

Consult Real Estate Law for specific directions.

Germany.

As to proper execution and certification of papers in Germany. See *In re Kroog's Est.*, 89 Misc. Rep. 35, 152 N. Y. Supp. 553.

Acknowledgments and certificates made in countries over which the United States exercises control, and by soldiers and sailors in service may be made as follows:

Acknowledgments and proofs elsewhere.

If the party or parties executing such conveyance shall be or reside in any place over which the United States of America at the time has or exercises sovereignty, control, or a protectorate, or in case the party or parties executing such conveyance shall be certified by the officer taking the acknowledgment or proof to be enlisted or commissioned in the military or naval forces of the United States of America, either within or without the United States, the same may be acknowledged or proved before:

1. A judge or clerk of a court of record thereof, acting within his jurisdiction;
2. A mayor or other chief officer of a city, acting in such city;
3. A commissioner appointed for the purpose by the governor of this state and acting within his jurisdiction;
4. An officer of the United States regular army or volunteer service or national army, or United States national guard or United States marine corps, of the rank of captain or higher, or an officer of the United States navy or United States naval aviation corps, of the rank of lieutenant or higher.

The certificate of an acknowledgment taken before any of the officers mentioned in subdivision one, two or three of this section, shall have attached thereto the seal of the court or officer if he have a seal, and if such officer have no seal, then a statement to that effect. The certificate of an acknowledgment taken before an officer mentioned in subdivision four of this section, shall state his rank, the name of the city, or other political division, or country or place where taken, and that the party or parties executing such conveyance are enlisted or commissioned and engaged in military or naval duties. The fact that the officer before whom such acknowledgment was taken, was duly commissioned and acting as such at the time when such acknowledgment was taken shall be certified by the secretary of war or the secretary of the navy, as the case may be,

of the United States, or by the officer in the war department or the navy department having charge of the record of commissions of officers in such respective departments. § 300, *Real Property Law*.

Certificate to acknowledgment before clerk of court of record.

Where the acknowledgment is taken before the county clerk or before a clerk of a court of record, the county clerk should attach his own certificate setting forth, among other things, that he is authorized under the laws of his State to take acknowledgment or proof of conveyances to be recorded in that State.

Authentication of judgments of courts of another state.

In *Trebilcox v. McAlpine*, 46 Hun, 469-471, it is held "that sections 952 and 953 of the Code of Civil Procedure (now §§ 395, 396, Civ. Pr. A.), relate only to the authentication of copies of records, etc., of courts of foreign countries. The Code contains no provision as to the records of courts of other States in this country. Provisions for these are contained in the Constitution and Statutes of the United States."

Section 1, article IV, of the Constitution of the United States, provides: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," and section 905 of the United States Statutes provides the manner in which such acts, records and proceedings shall be proved.

The statute provides that the record or judicial proceeding shall be proved "by the attestation of the clerk and the seal of the court annexed if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, that the attestation is in due form." *Van Deventer v. Mortimer*, 56 Misc. Rep. 650.

Authentication of oaths of office. § 98, ¶ 105.

An oath of office may be taken before any officer authorized to administer oaths, and the requirement that it must have a certificate of authentication is omitted.

Method of service of papers. See Practice Rules 20, 21.

Service through post-office.

Where it is prescribed by statute, or in the general rules of practice, that a notice must be given, or a paper must be served, within a specified time, before an act is to be done; or that the adverse party has a specified time, after notice or service, within which to do an act; if service is made through the post-office, pursuant to statute or rule, three days shall be added to the time specified except that service of notice of trial may be made, through the post-office, not less than sixteen days before the day of trial, including the day of service.

Deposit in a branch post-office is equivalent to a deposit in a general post-office.

§ 164, *Civ. Prac. A.* Former §§ 801 and 798, *Code Civ. Pro.*

Proof of deposit in post-office.

Some decisions regarding service of notice of protest of negotiable paper apply in principle.

The fact that the notice was deposited with the post-office may be proved like other facts, by either direct or circumstantial evidence. It may be shown by the testimony of the person who deposited it, or by proof of facts from which it may be reasonably inferred that it was so deposited. *Central National Bank v. Stoddard*, 83 Conn. 332. In an action against an indorser, evidence tending to show that he did not receive notice of dishonor is competent upon the question as to whether notice was ever mailed to him, and the exclusion of such evidence is error. *Union Bank v. Deshel*, 139 App. Div. 217.

Presumption as to delivery.

A notice placed in a mail chute under the control of the post-office department in the city of New York on the day of protest and postmarked the following day at noon will be presumed, in the absence of evidence to the contrary, to have been delivered before the close of business on that day. *Wilson v. Peck*, 66 Misc. Rep. 179.

Special provision for deposit in post-office applicable to surrogate's court.

Subdivision 18 of section 314 reads as follows:

18. Whenever in this act a citation, order, notice or paper is directed to be deposited in the "post-office" or in a "specified post-office," such deposit may

be made or directed to be made in any post-office, branch post-office, sub-station or letter box maintained and exclusively controlled by the United States Government.

Day, computation.

A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. Sunday or a public holiday, other than a half holiday, must be excluded from the reckoning if it is the last day of any such period, or if it is an intervening day of any such period of two days. In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning.

§ 20, *General Construction Law*.

Time for publication of notice; how computed.

The period of publication of a legal notice, in an action or special proceeding brought in a court either of record or not of record, or before a judge of such a court, must be computed, so as to exclude the first day of publication, and include the day on which the act or event, of which notice is given is to happen, or which completes the full period of publication.

§ 144, *Civ. Prac. A.* Former § 787, *Code Civ. Pro.*

Supplying and amending papers.

Papers lost or withheld; how supplied.

If an original pleading or paper is lost, or withheld by any person, the court may authorize a copy to be filed and used, instead of the original.

Civ. Prac. Rule 14. Former § 726, *Code Civ. Pro.*

Order of court; when necessary to amend.

A process, pleading, or record, shall not be altered, by the clerk or any other officer of the court, or by any other person, without the direction of the court, or of another court of competent authority; except in a case where a party, or his attorney, is specially authorized by law to amend a pleading.

§ 2053, *Penal Law.* Former § 727, *Code Civ. Pro.*

Mistakes, omissions, defects, and irregularities.

By sections 105 to 112 Civil Practice Act defects and irregularities not affecting the merits may be supplied or ignored.

¶ 26 Citation and Other Process; General Contents.

Process; how executed and returnable.

The process of the surrogate's court shall be a citation to show cause, an order to show cause, and such other process and mandate as the surrogate is or shall be authorized by law to issue and employ in the performance of the duties imposed on him and in the enforcing of his orders and decrees.

A citation or other mandate of a surrogate's court must, except where it is otherwise specially prescribed by law, be made returnable before the surrogate's court from which it was issued, and may be served or executed in any county. A warrant of attachment must be directed to the sheriff of the surrogate's county, who may execute it in any county, and must convey the person arrested to the place where it is returnable.

§ 52, *Sur. Ct. A.* Former § 2522, *Code Civ. Pro.*

It will be noticed that there is now no citation "to attend," but all citations are "to show cause." Under the former form of citation many persons were put to needless expense and waste of time when they had no objection to the proceeding, but supposed from the language of the citation that it was necessary for them to attend in accordance with the order of the court.

Where the presence of a person is commanded, an order to show cause is issued.

Citations and other process of surrogate's court.

Each writ, process, or pleading must be in the English language.

A writ or other process must be tested in the name of the judge of the court and must be returnable within the time prescribed by law or fixed by the court and when returned with proof of service thereof must be filed with the clerk of the court.

It must before the delivery thereof to the officer to be executed, be subscribed or indorsed with the name of the officer by whom or by whose direction it was granted or with the name of the attorney for the party or person at whose instance it was issued.

Such writ or other process thus subscribed or indorsed is not void or voidable by reason of having no seal or a wrong

seal thereon or of any mistake or omission in the teste thereof or in the name of the clerk, unless it was issued by special order of the court. Practice Rules, 10-16.

Notice to parties.

The Surrogates' Court Act also provides that in certain cases a notice shall be given to the persons interested. While such notice is not strictly speaking a "process," yet it is an essential requirement in obtaining a valid decree or order and should be so recognized.

Warrant of attachment for witness.

The surrogate may issue a warrant of attachment to bring a duly subpoenaed witness before him as provided in section 406 of the Civil Pr. A.

Such warrant must be directed to the sheriff of the surrogate's county, who may execute it in any county, and must convey the person arrested to the place where it is returnable. Section 52, Sur. Ct. A.

All citations are "to show cause" instead of "to attend" as was the command at one time, and they do not in terms require the presence of the party cited.

An order to show cause may be employed to bring on a motion or shorten the length of time required for notice of motion. In some cases the presence of a party is required, and he is then ordered to show cause, and such an order should be signed by the surrogate, and the party served should appear in person.

The practice of initiating proceedings to vacate decrees by order to show cause or notice of motion has been recognized for many years. *Cluff v. Tower*, 3 Dem. 253; *Matter of Smith*, 65 Misc. Rep. 417, 121 N. Y. Supp. 1087; *Matter of Wicke*, 74 App. Div. 221, 77 N. Y. Supp. 558; *Matter of Doig*, 125 App. Div. 746, 110 N. Y. Supp. 93; *Deobold v. Opperman*, 111 N. Y. 531.

Service of order to show cause.

Service of the order to show cause should be made by personal service of a certified copy thereof. As all orders are required to be filed in the surrogate's office, one cannot be delivered to a party to make service by showing the original when delivering a copy.

There has been some difference of opinion about the manner of service, but most surrogate's offices recognize the service by certified copy as good. In as much as section 84 Surrogates' Court Act authorizes the service of a certified copy of a decree as sufficient service to base contempt proceedings upon, it would seem that a like service would be good of an order to show cause.

General contents of citation.

A citation must substantially set forth:

1. The name and residence of the petitioner, and of the person to whose estate or fund the proceeding relates.
2. The names of all the persons to be cited who have not waived its issue and service, or have not appeared, so far as the same can be ascertained.
3. The time and place when the citation is returnable, which time must not be more than four months after the date thereof.
4. The object of the proceeding in regard to which the persons cited are required to show cause.
5. The date when the citation issues.
6. It must be attested in the name of the surrogate, and by the seal of his court.

§ 53, *Sur. Ct. A.* Former § 2523, *Code Civ. Pro.*

While formerly there were two forms of citation, one "to attend" and another "to show cause" only the latter is now used. By its use an issue is made in the first instance, so that by the respondent's default in appearing he admits that he has no cause to show against granting the relief asked for.

Fixing return day of citation.

A citation differs from a summons in this that there is no date fixed in advance for the return of a summons and so it is necessary to fix a time in which the party may appear after the service is complete; while with a citation, the date of ap-

pearance is fixed in the citation and the requirement is that the service shall be made or the publication shall be begun a certain number of days before such return day.

The return day may be included in estimating the eight days required for such service. Service on the twelfth day of a citation returnable on the twentieth, is sufficient. *Matter of Carhart*, 2 Dem. 627.

Return day governed by facts stated in petition.

The petition should state the ages and places of residence of the parties. This is essential, in order that the court may fix the return day of the citation. If the petition does not state such facts, an affidavit on the subject should be required. Sur. Ct. Act, § 51. If it appear that all of the persons to be cited reside in the county of the surrogate or an adjoining county, a return day will be fixed so that the same may be served at least eight days prior thereto; if in any other county of the State, so that the service may be made at least ten days before the return day; and if out of the State, such a return day must be fixed as to enable personal service thereof at least twenty days before the return day, or a return day fixed at least four weeks in advance, in order that service may be made by publication. Although perhaps not strictly necessary, an order for the issuing of the citation is usually entered, but an order must be entered where the service is to be made by publication. The only guide the surrogate has, by which to fix the return day, is the place of residence stated in the petition. Hence, if the residence is stated to be in another State, the only proper course would seem to be to make an order for personal service without the State, or by publication.

It would appear to be irregular, in fixing a return day, to be influenced by a promise to bring the party within the county in order that a service of eight days might be effected.

However where the person is a nonresident and an allegation is made that he is within the State, service may be made upon him within the State (§§ 58, 59), and in that case the citation could be made returnable in less than twenty days,

or if issued returnable in twenty days could be served within the State within the time required for a service upon a resident.

There seems to be no good reason why, if a nonresident be in the State, he can not be served with citation within the State.

Bringing infants into the state.

A minor can waive no rights, and it would seem improper, if not illegal, to bring him into the county to subject him to process. Of course, adults, wherever their residence may be, may waive legal service, or may volunteer an appearance, so as to confer jurisdiction. Minors cannot. *Matter of Merritt*, 5 Dem. 544.

Return day need not be within the week following the last publication.

Some attorneys seem to think that the publication must be during the four weeks immediately preceding the return day, following the rule of publication in actions. There is no such requirement in Surrogate's Court, so that the publication may end more than a week prior to the return day.

Citation of firm or copartnership.

A firm or copartnership should not be designated in the citation by the firm or copartnership name, but by the names of the individuals as composing such firm. The copartnership is not a legal entity and the name is only a commercial convenience.

Service of citation, however, upon one of the persons composing the firm will be sufficient.

General contents of citation; persons constituting a class; persons unknown or whose names or parts of names are unknown.

In addition to the requirements of the last section, a citation must substantially set forth:

1. Where the names of some persons to be cited comprising a class are unknown, the names of those persons of the class who are known, and a general description of all other persons belonging to such class, showing their connection with the decedent and their interest in the property or matter in question.

2. Where the persons to be cited are unknown, a general description of such persons showing their connection with the decedent and their interest in the property or matter in question.

In either of said cases where the petitioner is ignorant of the name of a person to be cited, he may designate that person in the citation by a fictitious name or by so much of his name as is known, adding a description identifying the person intended.

3. In every case where it appears that there is no heir-at-law or next of kin, as the case may be; or that it is not known whether or not there be such; or when all of the parties interested are non-resident aliens, the citation shall be issued to the attorney-general of the state.

§ 54, *Sur. Ct. A.* Former § 2524, *Code Civ. Pro.*

The citation should be addressed to the heirs-at-law and next of kin of an unknown person, if he has been absent more than seven years, or if there are other reasons to establish a presumption of death.

If, however, the person is known to be living, or if he has not been absent a sufficient length of time, or there are no other facts which lead to a presumption of death, the citation should be addressed to that person as a living person whose residence is unknown. Great care should be exercised in this matter in order that jurisdiction may be obtained over unknown persons, or the heirs and next of kin of such persons.

CHAPTER VII.

Service of Citation Within and Without This State. Appearance; Appointment of Special Guardian.

- ¶ 27. § 55. Citation, how served within the State.
 § 60. Upon infant or habitual drunkard, addition requirement.
- ¶ 28. § 56. Citation, how served without the State personally or by publication, or within the State by publication.
 § 57. Application for order.
 § 58. Order and contents.
 § 59. Within what time and how service shall be made.
- ¶ 29. § 61. Proof of service of citation, subpoena and process.
 § 62. Publication, in what newspapers.
- ¶ 30. § 63. Appearance, how made, and effect thereof.
 § 64. Special guardian, appointment.

¶ 27 Service of Citation Within the State.**Citation; how served within the state.**

Personal service of a citation within the state shall be made as follows:

Upon an adult person, or upon an infant of the age of fourteen years or upwards, by delivering a copy thereof to the person to be served.

Upon an infant under the age of fourteen years, by delivering a copy thereof to the infant in person, and to his father, mother or guardian; or if there be none within the state, or if the infant does not reside with a parent, to the person having the care and control of him, or with whom he resides, or in whose service he is employed.

Upon a person judicially declared to be incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness, or upon a corporation by delivering a copy thereof in the manner prescribed for personal service of a summons in an action in the supreme court upon such a person, or upon a corporation.

Upon a public officer by delivering a copy thereof to such officer, or to one of his duly constituted deputies.

Where it appears, by affidavit, to the satisfaction of the surrogate from whose court a citation is issued, that proper and diligent effort has been made to serve it as hereinbefore prescribed in this section upon a resident of the state whose place of residence or place of business is known, and that the person to be served cannot be found at his residence or place of business, and cannot be elsewhere served within the state within a reasonable time, or, if found, that he evades service, so that it cannot be made; the surrogate may make an order directing that service thereof be made, by leaving a copy thereof, and of the order, if the defendant is a domestic corporation or joint-stock or other unincorporated association at its principal office or place of business, or if a natural person

at the residence of the defendant, with a person of proper age, if upon reasonable application, admittance can be obtained, and such person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer or other door of the defendant's said place of business or office, or of his residence, and by depositing another copy thereof, properly enclosed in a postpaid wrapper, addressed to the defendant at its said principal office or place of business, or to him at his place of residence, in the post-office at the place where he resides, or where said office, place of business or residence is located, or upon proof being made by affidavit that no such residence can be found, service of the summons may be made in such manner as the court may direct; the order, and the papers upon which it was granted, must be filed, and the service must be made, within ten days after the order is granted; otherwise the order becomes inoperative. On filing an affidavit, showing service according to the order, the citation is deemed served, and the same proceedings may be taken thereupon, as if it had been served by publication, pursuant to an order for that purpose.

Where it is necessary in any special proceeding to cite known creditors, and it appears that the number of creditors or persons claiming to be creditors, residing within the state of New York, upon whom citation is required to be served, exceeds fifty, service thereof may be made upon them by publication thereof in such newspaper or newspapers and for such a length of time as shall be fixed by the surrogate, and by the mailing of a copy of such citation to each of them by deposit of a copy thereof in the post-office, properly enclosed in a postpaid sealed wrapper addressed to each of them at his last known post-office address as stated in the order, at least twenty days prior to the return day thereof.

§ 55, *Sur. Ct. A.* Former § 2525, *Code Civ. Pro.*

This section provides either personal or substituted service on all residents who can be found or who have a residence or place of business so that personal or substituted service can be made. It also authorizes substituted service of resident creditors. This leaves to be served by publication nonresidents, residents who cannot be found, and those who have no residence or place of business, and persons unknown, provision for which is made in the next section.

The provision for leaving at the residence with a person of suitable age has been omitted from the revised section, and such service is no longer sufficient. It had become an easy way to make a legal personal service which was in no sense a personal service and, in practice was being constantly abused. Under the section as now drawn, an order for leaving at the house can be obtained.

Service upon an infant under fourteen is made by delivery of citation to the infant in person and also to the father, mother or guardian if within the State, and it is only where there is no such person within the State, that service can be made upon the person having the care and control of him. The service is not complete until both these acts have been performed. It requires the double service to make a complete service.

Idem; upon infant, et cetera; additional requirement in certain cases.

Where a person cited, or to be cited, is an infant, or where the surrogate has, in his opinion, reasonable grounds to believe, that a person cited, or to be cited, is an habitual drunkard, or for any cause mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the surrogate may, in his discretion, with or without an application therefor, and in the interest of that person, make an order requiring that a copy of the citation be delivered, in behalf of that person, to a person designated in the order and that service of the citation shall not be deemed complete until such delivery.

§ 60, *Sur. Ct. A.* Former § 2530, *Code Civ. Pro.*

The name of the designated person should not be included in the citation, and service need not be made upon him as though he were a party.

The order for additional service should direct that the delivery of the citation to the person designated be made a certain number of days before the return day thereof.

Complete provisions for appointment of special guardian will be found in section 64 (¶ 30), and this section is not now the authority for appointing a special guardian.

Regular service must be made upon the infant or incompetent.

Notwithstanding the designation of a person upon whom service shall be made, the citation must be regularly served upon the infant or incompetent person, and an additional and further service made upon the person designated. Making the designation does not obviate the necessity of making personal service on the infant or incompetent. *Matter of Cartwright*, 3 Dem. 13.

Where no service of citation is made upon an infant he is not bound by a decree, although represented by special guardian. *Davis v. Crandall*, 101 N. Y. 311.

Service upon domestic and foreign corporation.

Consult sections 228, 229 and 377, Civ. Pr. A., also section 16, General Corporation Law.

Service of citation on partnership.

Where parties are named in the citation as composing a partnership, service upon one of such partners will be sufficient service, since under the law one partner can bind the other partner as to partnership business and he is the agent of the other in all partnership matters. See art. 2, § 5, of the Partnership Law.

Substituted service upon a resident.

Where a citation has been issued to a resident of the State and it has been found impossible to make personal service as prescribed in section 55, Sur. Ct. A., application may be made to the surrogate for an order for substituted service.

Such application should be made upon an affidavit setting forth facts which show: That proper and diligent effort has been made unsuccessfully to secure personal service; that the person to be served cannot be found, or, if found, that he evades service.

Service as provided by this section gives jurisdiction of the person and authorizes any order shown to be proper. *Scharmann v. Schoell*, 38 App. Div. 528, 56 N. Y. Supp. 498. See also 23 App. Div. 398, 48 N. Y. Supp. 306.

The order and the papers upon which it was granted must be filed.

Service must be made within ten days after the order is granted, otherwise the order becomes inoperative.

On filing an affidavit showing service according to the order the citation is deemed served. From § 55 Sur. Ct. A.

Where the party to be served is a resident of the State but his specific place of residence cannot be ascertained, so that

personal service cannot be made, there may be inserted in the order any such directions as to service as are acceptable to the court and seem most likely to result in personal notice to the interested party, as by delivering a copy of the citation and order to some person in charge of his office (street and number designated). Or, if reasonable application at said office, during ordinary business hours, fails to accomplish this result, then by affixing the same to the entrance door of said office.

The court is given power to direct any method of service in case the defendant's residence cannot be found.

Service by publication.

Where substituted service cannot be made, service by publication of the citation is authorized. See ¶ 28.

Service upon an incompetent person.

Until a person is judicially declared to be incompetent to manage his affairs, he must be treated, so far as the service of process is concerned, as if he were competent, although he be in fact incompetent.

Rules of the State Commission in Lunacy as to service of papers upon inmates of institutions.

That the superintendent or officer in charge of each institution for the care and treatment of the insane be directed not to permit the service of any legal process, other than citations for probate of wills, letters of administration, or on application for an intermediate or final settlement of the accounts of committees, or on final accountings in surrogate's courts, or such as may be instituted for the appointment of committees, upon any insane patient except upon the order of a judge of a court of record, which shows that the judge had notice of the fact that the person sought to be served was at the date of the order an inmate of such institution.

From Rule 1.

A certified copy of the citation or other process should be sent for filing in the office of the institution.

In a suit where an incompetent is a necessary party service upon him and his committee makes a decree valid, although no leave to sue has been obtained. *Meeks v. Meeks*, 51 Misc. Rep. 541.

¶ 28 Service of Citation Without the State Personally or by Publication; or Within the State, Upon Absent or Unknown Parties by Publication.

Service personally without the state, or by publication; when ordered.

The surrogate from whose court a citation is issued may make an order directing the service thereof personally without the state, or by publication, in either of the following cases:

1. Where it is to be served upon a foreign corporation, or upon a person who is not a resident of the state.
2. Where the person to be served is a resident of the state, and substituted service upon him cannot be authorized as provided in section 55 of this act.
3. Where it is to be served upon a party, or a person required to be made a party, whose name, or residence, cannot be ascertained.
4. Where it is to be served upon one or more unknown creditors, next of kin, heirs, legatees or other persons, either individually or included in a class, to whom a citation has been directed, designating them by a general description, as prescribed in this act. § 56, *Sur. Ct. A.* Former § 2526, *Code Civ. Pro.*

Application for order permitting service by publication or personally without the state.

Application for an order permitting service of a citation by publication or personally without the state of New York must be made upon the petition, or upon an affidavit, which must set forth to the satisfaction of the surrogate the facts which show that the case is one of those specified in section 56 of this act and that the petitioner has used due diligence to ascertain the names and post-office addresses of the parties whose names or post-office addresses are unknown. § 57, *Sur. Ct. A.* Former § 2527, *Code Civ. Pro.*

The citation can be served by publication under this section upon residents who cannot be served by substituted personal service as provided in § 55, (¶ 27).

Waivers of nonresidents may be filed. See ¶ 20.

The petitioner may file with his petition a waiver of issue and service of the citation and in that case no order for publication or service without the State is necessary.

Nonresident parties.

Where any person interested is a nonresident and his place of residence known, he is served outside of the State, pursuant to an order for service without the State or by publication at the option of the petitioner.

Nonresidents whose places of residence are unknown.

Such persons are also served pursuant to an order of publication, based upon facts set out in the petition or in a special affidavit, showing that diligent effort and inquiry has been made to find such persons and that their places of residence cannot be ascertained.

Unknown heirs and next of kin of a known interested deceased person.

A known interested deceased person may have died leaving heirs and next of kin whose names and places of residence are unknown. Similar inquiry should be made as to them and the facts set up as before stated, and they should be served by publication in like manner.

Unknown heirs-at-law and next of kin of the deceased.

Because a surviving husband or widow or next friend does not know that the deceased left any heirs-at-law or next of kin, it is not safe to settle an estate without serving all such unknown persons, if any exist, by publication. In no other way can the representative have a decree of distribution which will be a protection to him, except by availing himself of these statutory provisions for acquiring jurisdiction of all parties who might be interested in the estate.

The affidavit.

The affidavit or petition upon which the order of publication must be based is so important and is so often imperfectly drawn that the words of Justice Gaynor written in passing upon an affidavit used in Supreme Court should be heeded when such an affidavit or petition is about to be prepared. He said: "An affidavit is not a pleading, in which allegations of conclusions of fact may be permissible; on the contrary, it is a statement of facts from which judicial conclusions may be drawn. Sections 438 and 439 of the Code of Civil Procedure require 'proof by affidavit' that each of the said defendants 'is not a resident of the State;' or that 'after diligent inquiry, the defendant remains unknown to the plaintiff, or the

plaintiff is unable to ascertain whether the defendant is or is not a resident of the State,' and ' that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons. The mere statement of these things in the language of the statute is not proof of them, nor evidence, which is not always proof. They were conclusions for the judge to find, not for the plaintiff to state. It was for her to state facts which would prove them, and thereby give the judge jurisdiction to find them. There is no statement of any fact of inquiry by the plaintiff to ascertain where either of these defendants resided. No fact is stated to show that she knew or ever knew them, or anything about them or their residence or whereabouts, or that they sometimes came or never came into the State. If she had made inquiry, and stated all the facts ascertained by her, the judge might have been able to find therefrom that they were nonresidents of the State, or that the plaintiff was unable to ascertain whether they were residents or nonresidents, or, if the latter, the particular place of their residence; and also (as the statute requires even in the case of nonresident defendants) that she had been and would be unable with due diligence to make personal service on them within the State — which would be the case if they were not in the habit of coming into the State, frequently. But without such proof the judge had no jurisdiction to so find. The plaintiff could not decide for herself what ' due diligence ' was, or that she had exercised it, or that personal service could not be obtained by the exercise of it. That was for the judge." *Kennedy v. Lamb*, 182 N. Y. 228.

" The persistency with which such affidavits have so long continued to state in the language of the statute the conclusions which the statute requires the judge to find from proved facts before he may grant the order, instead of stating the specific facts from which such conclusions may follow and be found by the judge, is most remarkable in our learned profession, especially in view of the long line of litigation and

the serious consequences to titles which it has caused.” *McLaughlin v. McCann*, 123 App. Div. 67, 107 N. Y. Supp. 762.

It has been held that service under an order of publication was not valid where the petition stated that an infant resided with her mother in Vermont, but was in school in Brooklyn, on the theory that the infant was a “resident” of Brooklyn and should have been served personally there. *In re Gahn’s Will*, 110 Misc. Rep. 96, 180 N. Y. Supp. 262. Following this reasoning in case of an infant whose father or mother was a resident of New York State, and the infant was attending school in Vermont, it would be proper to state the residence of the infant as being in Vermont. As the legal residence of an infant follows that of the father or mother, it would be necessary to construe “residence” as used in that section to mean a temporary abiding place, even for a few weeks only.

A distinction is drawn between an allegation of residence in a far distant State and in a nearby State. In the former case there is a presumption of fact that the person can not be served in this State within a reasonable time, but no such presumption exists where the residence is shown to be in a bordering State. *Kennedy v. Lamb*, 182 N. Y. 228; *Sunswick Land Co. v. Murdock*, 129 App. Div. 579; 114 N. Y. Supp. 436, aff’d, 199 N. Y. 517.

Petitioner should show his knowledge that no heirs-at-law or next of kin exist; not his lack of knowledge.

A person who files a petition for probate or for grant of letters of administration in cases where heirs-at-law and next of kin are unknown should not content himself with making allegations that no such persons exist, but should make such a thorough investigation of the family history that he can allege facts which tend to prove that no heirs-at-law or next of kin survive, upon which the surrogate may decide and determine that such a condition obtains. It is not sufficient for this purpose to allege want of knowledge unless such absence of information or knowledge amounts to some evidence that no such persons are in being.

While a petition uncontroverted is taken as *prima facie* proof of the facts alleged (¶ 32) it does not appear that in all cases it will be accepted, collaterally, where no facts are set up and proved and no decision upon the point is made. *Matter of Clarke*, 131 App. Div. 688, 116 N. Y. Supp. 101; *aff'd*, 195 N. Y. 613.

Before a person's heirs, whether known or unknown, can be cut off by service by publication, the person commencing the proceeding should institute diligent inquiry to discover who and where they are and should submit the facts showing such inquiry to the court. A mere negative statement or a mere statement which amounts to a conclusion of law that there are no known heirs is insufficient. *Matter of O'Neil*, 49 Misc. Rep. 285, 99 N. Y. Supp. 237.

Presumption that heirs or next of kin exist.

There is a presumption that every person dying leaves one or more heirs or next of kin entitled to take his real property by descent or his personal property by distribution. *Ettenheimer v. Heffernan*, 66 Barb. 374.

This presumption, of course, is not conclusive, and it may be overcome by circumstantial evidence or by great lapse of time. *Matter of Clarke*, 131 App. Div. 688, 116 N. Y. Supp. 101.

Based upon the absence of or inability to find a resident of the state.

Where substituted personal service cannot be made on a resident of the State, he may be served by publication of the citation, the new sections having made a separation between publication and service without the State, which did not exist under the former sections where the order had to embody both methods of service. Where the papers show that a resident cannot be found, or is absent from the State an order authorizing service by publication alone may be made.

Where service is to be made on persons unknown, or who constitute a class.

In cases where the persons' names are unknown, or they are unknown, or they are some of a class of persons and their names are unknown, they should be described, and all information serving to identify them should be given, with a statement of what efforts have been made to obtain more information concerning them. See § 51, ¶ 25.

The petitioner must show either by the petition or by a special affidavit the name of each of said persons, unless the name or part of the name of one or more of them cannot after diligent inquiry be ascertained by him, or that there may be others whose existence is unknown, in which case, that fact must be set forth and the surrogate must thereupon inquire into the matter.

The surrogate may issue a subpoena requiring any person to attend before him to testify respecting the matter.

If he is satisfied upon the allegations of the petition, or the affidavit, or after making such inquiry that the name of one or more of the persons to be cited cannot be ascertained with reasonable diligence, the citation may be directed to that person or those persons by a general designation showing his, her, or their connection with the decedent or interest in the property or matter in question; or otherwise sufficiently identifying the person or persons intended.

Effect of such citation.

A citation thus directed has the same force and effect as if it was directed to the person or persons intended by their names; and where the person or persons so intended are duly served with such citation in any manner prescribed by law, the decree binds them as if they were named therein.

Order, when and how made; contents thereof.

When an order, directing the service of a citation personally without the state, or by publication, is made, if the order authorizes service by publication, it must direct that the citation be served upon the persons named or described

in the order, by publication of the citation in two newspapers, therein designated, unless from the petition or affidavit filed it appears that the estate or fund amounts to less than five thousand dollars, in which case only one newspaper shall be designated, for such specified time as the surrogate deems reasonable, not less than once in each of four successive weeks, and by mailing a copy of such citation as provided in section 59 of this act; except that the order may dispense with such mailing to persons whose names or addresses are alleged in the petition or affidavit to be unknown, or to persons who are alleged in the petition or affidavit to be within a country with which the United States of America is at war, or to be in a place with which by reason of the existence of a state of war the United States of America does not maintain postal communication. The court shall direct that the citation be mailed on behalf of such persons to such officer as may have been appointed by the president of the United States of America to take possession of the property of alien enemies, at Washington, District of Columbia.

If the order authorizes personal service without the state of New York, it must direct that service be made upon the parties named therein in the manner prescribed in section 59 of this act.

The order may authorize both modes of service at the option of the petitioner, or may direct that service be made by either mode without embodying the other. The granting of an order for service by publication, or personally without the state, shall not prevent the personal service of such citation within the state.

§ 58, *Sur. Ct. A. Former § 2528, Code Civ. Pro.*

This section enables the surrogate to make an order for either mode of service, by publication or personally, without the State, without embodying both.

The manner of service is found in section 59.

The last sentence enables service to be made within the State after an order has been granted.

Publication in one newspaper only may be made where the estate or fund does not exceed \$5,000, instead of \$2,000 as heretofore.

Validity of order.

Where the essential facts upon which an order for other than personal service is based are erroneously stated, service made thereunder is null and void. *Clarkson v. Butler*, 173 App. Div. 143, 159 N. Y. Supp. 343.

The validity of an order of publication of citation must be judged solely upon the statements in the affidavit or petition upon which it was granted. *Matter of Gahn*, 110 Misc. Rep.

96, 180 N. Y. Supp. 262; *Finck v. Wallach*, 47 Misc. Rep. 247, 95 N. Y. Supp. 872. *In re Norwood's Est.*, 181 N. Y. Supp. 494.

Order for service on unknown persons.

It is of the utmost importance that the order should not only direct service to be made upon the known persons who are to be served thereby, but that it should also direct service to be made upon the unknown persons, using some such language as this: "And upon A. B., an heir-at-law and next of kin of the said deceased, if alive, whose place of residence is unknown and after due diligence used can not be ascertained, and if he be dead upon his widow, heirs-at-law, and next of kin, whose names and places of residence are unknown and after due diligence used cannot be ascertained, and generally upon all of the heirs-at-law and next of kin of the said deceased testator and their respective widows (or husbands), whose names and places of residence are unknown and after due diligence used cannot be ascertained."

The publication of a citation to unknown creditors, without an order the court authorizing or directing the same, does not give the court jurisdiction. *In re Reed*, 221 N. Y. 585.

The citation.

The citation should itself contain the same language as to such unknown persons as is contained in the order. No jurisdiction of such unknown persons will be obtained through service by publication unless the order in terms directs service to be made upon them and the citation itself is directed to them in the same manner.

Where petition gave an address of a nonresident by one street number and the order of publication and proof of mailing gave another number on the same street, *held* not good service. *Matter of Harlow*, 73 Hun, 433, 56 N. Y. St. Repr. 33, 26 N. Y. Supp. 469.

Personal service within the state after order granted.

This section now in terms gives the right of personal service within the State after an order has been made for publication or personal service without the State. Where the party is found within the State, service of the original citation may be made in the same time as though he were a resident. This enables the petitioner to take a long citation, and if he finds that the party has come into the State, to serve the same citation upon him here.

Under the former section the cases were somewhat conflicting, and it was not safe to make service within the State in such cases. *Matter of Porter*, 1 Misc. Rep. 489, 22 N. Y. Supp. 1063. Criticised and rule changed in Westchester county. *Matter of Washburn*, 12 Misc. Rep. 242, 67 N. Y. St. Repr. 895, 34 N. Y. Supp. 44.

When service of citation shall be made; manner of service without the State or by publication.

Any person over eighteen years of age, although a party to the special proceeding, may serve a citation.

Service of a citation upon a resident of the state, or upon a nonresident within the state, must be made, if within the county of the surrogate, or in an adjoining county, at least eight days before the return day thereof; and if in any other county of the state, at least ten days before the return day thereof.

Service of a citation personally without the state of New York, pursuant to an order therefor, must be made in the same manner as is required by this act for the personal service of a citation within the state, by delivering a copy of such citation, if within the United States at least twenty days, and if without the United States at least thirty days before the return day thereof.

Service of citation by publication must be made by publication of the citation as prescribed in such order, and by the deposit, on or before the day of the first publication, in a specified post-office, of a copy of the citation, contained in a securely closed postpaid wrapper, directed to the person to be served, at a place specified in the order; and if the person to be served is an infant under the age of fourteen years, a further copy, likewise contained in a securely closed postpaid wrapper directed to the father, or the mother, or the guardian, and the person with whom such infant is sojourning; unless by the terms of the order mailing is dispensed with. § 59, *Sur. Ct. A.* Former § 2529, *Code Civ. Pro.*

Taken with section 55 complete provision is made for service of citation.

Section 314 subdivision 18 permits the deposit of the papers in any post-office or letter box maintained and exclusively controlled by the United States government.

Service by party.

Service of citation by a party specially permitted by this section.

Citation for probate may be served by an executor or legatee. *Wetmore v. Parker*, 52 N. Y. 450; aff'g, 7 Lans. 121.

Personal service under order of publication.

Where an order for publication is made with an option for personal service, the citation should be made returnable late enough to permit publication. In *Matter of Macauley*, 94 N. Y. 574, personal service under a citation returnable in less than six weeks was held to be regular.

Admission of service. See § 61, ¶ 29.

A party interested may admit due and personal service of a citation, and if the time and place of such service is not designated, it is but an irregularity, and does not affect jurisdiction. *White v. Bogart*, 73 N. Y. 256.

An admission of "due service" not only admits proper service, but that service was made within the necessary time. *Harmon v. Van Ness*, 56 App. Div. 160, 67 N. Y. Supp. 561; *Mohr v. Dorschel*, 49 Hun, 607, 2 N. Y. Supp. 33, 15 Civ. Pro. Rep. 22.

A nonresident cannot make an admission of service out of the State which will give jurisdiction, unless an order for publication, or for personal service without the State has been made. *Litchfield v. Burwell*, 5 How. Pr. 341.

When service complete.

The publication need not be completed eight days before the return day. *Matter of Denton*, 86 App. Div. 359, 83 N. Y. Supp. 778; aff'g, 40 Misc. Rep. 326, 81 N. Y. Supp. 1031.

Service is not complete until the expiration of four full weeks from the time of the first publication. *Matter of Koch*, 19 Civ Pro. 165, 12 N. Y. Supp. 94.

The publication must be a distinct publication in each of the four weeks succeeding the first. *Gray v. Journal of F. Pub. Co.*, 2 Misc. Rep. 260, 50 N. Y. St. Repr. 764, 21 N. Y. Supp. 967.

The publication of a citation must be for full four weeks, and therefore a citation which is served by publication can not be returnable in less than 28 days after the day of first publication. *In re Wright's Will*, 183 App. Div. 266, 171 N. Y. Supp. 123, aff'd, 224 N. Y. 293.

There is no requirement that the service be completed any specified number of days before the return day of the citation. The service, however, must be completed by publication once in each of four successive weeks, which has usually been construed to mean that twenty-eight days must elapse between the first publication and the return day of the citation.

Publication; "four successive weeks."

The cases under former section 440 of the Code of Civil Procedure, relating to the service of a summons by publication, do not apply. The requirement there is that the publication shall be "once a week for six successive weeks." Section 58 of the Surrogate Act, requires that the service shall be "once in each of four successive weeks." *In Steinle v. Bell*, 12 Abb. Prac. (N. S.) 172, one publication was Monday, January 6th, the next Saturday, January 18th, leaving an interval of eleven days. It was held, however, that the publication was once in each week. We quote from the opinion:

"A week is a definite period of time commencing on Sunday and ending on Saturday."

This case was cited with approval in *Wood v. Knapp*, 100 N. Y. 109. *In re Reed*, 156 N. Y. Supp. 944, 171 App. Div. 21. This case was reversed, 218 N. Y. 711, on the ground that no order to publish had been obtained.

Publication need not be during the four weeks immediately preceding return day.

There is nothing in these sections which requires that the return day should be within the week immediately following the last publication. The words "immediately preceding" are not used in these sections. The four weeks' publication may be had at any time during the life of the citation.

¶ 29 Proof of Service of Citation and Other Process; Where and How Publication Made and Proved.

Proof of service of a subpoena, citation or other process.

Proof of service of a subpoena, citation or other process issued from a surrogate's court, must be made by the certificate of the sheriff, when served by him, and in any other case by the affidavit of the person so serving it; or, where the person served is of full age and not incompetent, by a written admission signed by him, accompanied with proof, by acknowledgment, affidavit or otherwise, of the genuineness of his signature; provided, however, that where service of a citation or order to show cause is made upon a public officer by delivering a copy thereof to one of his duly constituted deputies, a written admission, signed by such deputy, accompanied with proof in like manner of the genuineness of such deputy's signature shall be sufficient.

Proof of the publication of the citation and subpoena must be made by the affidavit of the printer or publisher, or his foreman or principal clerk. Proof of deposit in the post-office must be made by the affidavit of the person who deposited or delivered it. § 61, *Sur. Ct. A.* Former § 2531, *Code Civ. Pro.*

Proof of genuineness of signature on an admission of service, may be made by affidavit of any person, except the one so admitting.

Deposit of citation may be made in branch post-office, or letter box exclusively controlled by the United States government. See § 314, subd. 18.

Service of subpoena.

Service must be made according to requirements of section 404, Civ. Pr. A., but proof of service is made in accordance with section 61. The reference to publication of a subpoena must be an inadvertence.

Publication of citation, et cetera.

Where a provision of this act, or an order made pursuant to such a provision, directs the publication of a citation, notice, or other paper, or the service thereof by publication, the publication must be made in a newspaper published in the county. The surrogate may, also, in his discretion, direct the publication thereof in any other newspaper published in the same or another county, as he deems proper, for the purpose of giving notice to the persons intended to be served or notified. If no newspaper is published in the county, the citation, notice or other paper, must be published in the newspaper printed at Albany, in which legal notices are required by law to be published.

§ 62, *Sur. Ct. A.* Former § 2532, *Code Civ. Pro.*

State paper for publication of certain legal notices.

The State paper in which certain legal notices are required by law to be published is designated on or before the 1st day of January in each year by the Secretary of State, Comptroller, and Treasurer. The name of the paper designated for the current year may be ascertained by inquiring from the Secretary of State at Albany.

Publication, where no newspaper, et cetera, in county or city.

1. Where a notice, or other proceeding, is required by law to be published in a newspaper published in a county, and no newspaper is published therein, or to be published oftener than any newspaper is regularly published therein, the publication may be made in a newspaper of an adjoining county, except where special provision is otherwise made by law.

2. Where a notice or other proceeding is required by law to be published in a newspaper in a county which contains a city having no newspaper, or to be published in a newspaper in such city, the publication, if so required to be made in the county, may be made either in the county or in a city, outside the county, adjoining such city in which no newspaper is published; or, if so required to be made in the city in which no newspaper is published, the publication may be made in such adjoining city of another county.

§ 145, *Civ. Prac. A.* Former § 826, *Code Civ. Pro.*

The question naturally arises whether under this section and section 62 *Sur. Ct. A.* publication must also be made in the State paper. If it were to be so held, then publication would have to be made in two papers instead of one, as section 62 applies specially to the Surrogates' Courts and directs that publication be made in the State paper when the citation can not be published as therein directed.

Refusal to publish at legal rate.

Where the printer refuses to publish the notice for the legal fees, publication may be made in the State paper, or in a near-by paper in those cases where publication in State paper is ordered. See §§ 146, 147, Civ. Prac. A.

¶ 30 Appearance, How Made and Effect Thereof; Appointment of and Appearance by Special Guardian.**Appearance; how made and effect thereof.**

In a surrogate's court, a party of full age may, unless he has been judicially declared to be incompetent to manage his affairs, appear and prosecute or defend a special proceeding in person, or by attorney regularly admitted to practice in the courts of record, at his election, except in a proceeding to punish him for contempt, or where he is required to appear in person, by special provision of law, or by a special order of the surrogate. An appearance must be evidenced by a notice of appearance signed by the party or by his attorney, or in the case of a public officer, by such officer or a duly constituted deputy in the name of such officer, and filed in the surrogate's court; and where no citation has been served on the person appearing, such notice must be signed by him and be acknowledged or proved, and duly certified.

§ 63, *Sur. Ct. A.* Former § 2533, *Code Civ. Pro.*

Appearance must be evidenced by a signed notice. There ought to be no possibility of a dispute as to whether a person did or did not appear, and that possibility can be obviated only by a written appearance. Each Surrogate's Court furnishes a blank to be signed by all parties appearing.

The petitioner in the proceeding who verifies the petition, need not file a separate notice of appearance, as his petition is a written appearance.

As the Surrogate's Court is a court of record, there should be a record of all appearances, and when it is necessary to serve copies of papers, or of final decrees or notices of appeal upon all parties who have appeared, there should not be any uncertainty as to whether a person had or had not appeared, such as has always occurred under the old form of oral appearance.

Petition may not be sufficient appearance.

The filing of a petition signed and verified by the resident attorney for a nonresident petitioner, is not a sufficient notice of appearance to give the surrogate jurisdiction of the petitioner, and therefore the surrogate will not file such petition or issue process thereon. *In re Ford Est.*, 98 Misc. Rep. 100, 163 N. Y. Supp. 960.

Appearance by consul of foreign country for alien nonresidents.

The Danish consul may appear in Surrogate's Court for an adult resident of Denmark and waive issue and service of citation under the "most favored nation" clause in the treaty of April 26, 1826. *Matter of Peterson*, 51 Misc. Rep. 367, 101 N. Y. Supp. 285.

The same is true of consuls of other countries.

No consul of a foreign country can waive the issue and service of a citation upon an infant interested. *Matter of Peterson*, 51 Misc. Rep. 367, 101 N. Y. Supp. 285.

Appearance by infant or incompetent. See § 64, ¶ 30.

Effect of voluntary appearance, under former sections, as to being bound or estopped by decree. See ¶ 33.

A voluntary appearance authorizes any decree the court may make where it has jurisdiction of the subject matter. *Everts v. Everts*, 62 Barb. 577.

Answering upon the merits and taking part in further proceedings will have the effect of a general appearance without objection. *Matter of Bingham*, 127 N. Y. 296, modifying 32 N. Y. St. Repr. 782; *Peters v. Carr*, 2 Dem. 22; *Matter of Macauley*, 27 Hun, 577; *Matter of Post*, 30 Misc. Rep. 551, 64 N. Y. Supp. 369.

Where a person interested was not served with process, but appeared by attorney in the proceeding, the decree cannot be attacked collaterally, but a motion should be made in the proceeding itself. *Washbon v. Cope*, 144 N. Y. 287; revg. 67 Hun, 272.

A legatee and heir-at-law appeared upon probate, without notice issued and participated in a contest — *held*, that the decree of probate was *prima facie* evidence of due execution as against him. *Cook v. White*, 43 App. Div. 388, 60 N. Y. Supp. 153; *aff'd*, 167 N. Y. 588.

Voluntary appearance and participation by a devisee in proceedings by the executor for probate of a will do not constitute a waiver on the part of the devisee of the right to a jury trial of the question of the validity of the devise, after the refusal of probate by the surrogate on the ground of invalidity of the will, and such decree is not *res adjudicata* in a partition action. *Corley v. McElmeel*, 149 N. Y. 228, *aff'g*, 87 Hun, 23, 67 N. Y. St. Rep. 503, 33 N. Y. Supp. 862.

Appearance by person not cited; trial of right to intervene.

Section 41 provides that the court shall obtain jurisdiction of all persons who, though not cited, appear and make themselves parties to the proceeding. See ¶ 20.

Any person required to be cited, or given notice of a proceeding, or who has an interest therein, has a right to, and should, be made a party upon the record.

Where there is any question about the right of a person to appear and be made a party, the surrogate should first try the preliminary question as to the right of such person to be made a party to the proceeding. See ¶ 46.

Special guardian; when to be appointed.

Where a party, who is an infant, does not appear by his general guardian; or where a party, who is a lunatic, idiot, or habitual drunkard, does not appear by his committee; or where any party is an infant, or an habitual drunkard, or for any cause is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the surrogate must appoint a competent and responsible person, to appear as special guardian for that party. Where an infant appears by his general guardian, or where a lunatic, idiot, or habitual drunkard, appears by his committee, the surrogate must inquire into the facts, and must, in like manner, appoint a special guardian, if there is any ground to suppose that the interest of the general guardian or committee is adverse to that of the infant, or incompetent person; or that for any other reason, the interests of the latter require the appointment of a

special guardian. Where there are unknown persons, or persons whose whereabouts are unknown, the surrogate may, in his discretion, appoint a special guardian for such persons. A person cannot be appointed such a special guardian who is nominated by any party, but this prohibition shall not preclude an infant over fourteen years of age from nominating his own special guardian.

Before entering upon his duties such special guardian shall file his consent to so act.

§ 64, *Sur. Ct. A.* Former § 2534, *Code Civ. Pro.*

This section prohibits the appointment of a person nominated by any party unless by an infant over 14 years of age. The appointment of a special guardian is made by the surrogate as a matter of course, and pursuant to a duty devolving upon him to see that each infant, whether petitioner or respondent, has a special guardian appointed for him.

The surrogate is not bound to appoint the special guardian nominated by the infant, but it is often very desirable that he should do so. There may be an issue to be tried which is very important to the infant and he ought to be represented by counsel of his own choosing, or that of his parents or guardian. An infant "party" for whom a special guardian should be appointed, is one required to be served with citation. *In re Redfield*, 94 Misc. Rep. 20, 158 N. Y. Supp. 1004.

The importance of the office of special guardian.

Special guardians are the most important officers of the court. Their responsibilities are much graver than those of a referee; they must act independently of all persons interested in the estate. Family influence should not deter them from a most searching inquiry into all matters of interest to their ward. The solemn assurances of the most respectable executor, supplemented by personal statements of his counsel that of his own personal knowledge the details of the account are lawful and mathematically correct, would not justify these officers of the court in passing a single item of the account, nor any question of law involved, without personal examination. They must inquire and investigate, and then decide as to all matters in which their ward is interested. Their report to the court should give a full account of the matters in their

charge, stating their conclusions and their reasons therefor, and all must be based upon their independent personal investigation. The court is jealous of the rights of infants and will be watchful over them and their property. The special guardian is the arm of the court, and in his person this beneficent policy of the law is to be executed. *Matter of Wadsworth*, 24 N. Y. St. Repr. 416, 6 N. Y. Supp. 932.

An infant must be served with citation.

Appointment void unless jurisdiction of the infant has been obtained by service of citation. *Potter v. Ogden*, 136 N. Y. 384, aff'g, 65 Hun, 27, 47 N. Y. St. Repr. 190, 19 N. Y. Supp. 594.

The surrogate has no jurisdiction to appoint a special guardian for an infant party who has not been served with citation. *Davis v. Crandall*, 101 N. Y. 311; *Matter of Watson*, 2 Dem. 642; *Pinckney v. Smith*, 26 Hun, 524; *Hogle v. Hogle*, 49 id. 313.

Appointment of special guardian.

The parent of an infant party cannot appear for him. *Matter of Bowne*, 6 Dem. 51, 19 N. Y. St. Repr. 895.

Nor should the surrogate appoint any other person than a regular attorney to appear as special guardian for such infant. *Story v. Dayton*, 22 Hun, 450.

The special guardian has a right to take and prosecute an appeal and his duties and office continue until the final determination of an appeal. *Matter of Stewart*, 23 App. Div. 17, 48 N. Y. Supp. 999.

Although an infant appears by general guardian, the surrogate may of his own motion, without notice, appoint a competent attorney to appear for him, if upon inquiry the surrogate is satisfied that the interest of the infant will not be properly looked after by the general guardian or that his interests are adverse to those of the infant. *Matter of Ludlow*, 5 Redf. 391.

An application by the infant prior to the return day of the citation is premature. *Matter of Leinkauf*, 4 Dem. 1.

It is not proper to appoint a special guardian for an infant *nunc pro tunc*, in a probate proceeding where the decree was adverse to the infant. It would deprive him of his right to avoid the decree on arriving at age. *Matter of Bowne*, 6 Dem. 51, 19 N. Y. St. Repr. 895.

CHAPTER VIII.

Trial by Jury; Taking, Obtaining and Preserving Testimony; Decisions and Exceptions.

- ¶ 31. § 67. Trial by jury; how waived.
- § 68. Order for trial generally, and in New York county.
- § 69. How conducted; motion to set aside verdict and for new trial.
- § 70. Jurors, how drawn.
- ¶ 32. § 73. Testimony taken by surrogate in the State.
- § 74. Testimony taken before another surrogate.
- § 75. Bequest does not disqualify witness.
- § 76. Uncontroverted allegations in papers are due proof.
Taking testimony by commission.
- § 77. Filing testimony.
- § 71. Decision after trial by court.
- § 72. Exceptions upon trial.

¶ 31 Trial by Jury; How Obtained and Conducted.

Right to trial by jury preserved, how waived.

Whenever in any proceeding in the surrogate's court, the order or decree of the court will determine any issue or fact as to which any party has a right of trial by jury in any court, such trial shall be deemed to be waived, unless such party, personally, or through his attorney, guardian, committee, or special guardian appears and seasonably demands the same, in which case such trial shall be had according to the practice of such court. And whenever such trial is demanded, the same may be waived by failing to appear at the trial, by filing with the clerk a written waiver, signed by the attorney for the party, by an oral consent in open court, entered in the minutes, or by moving the trial of the action, without a jury, or, if the adverse party so moves it, by failing to claim a trial by a jury, before the production of any evidence upon the trial.

§ 67, *Sur. Ct. A.* Former § 2537, *Code Civ. Pro.*

The object of providing a jury for Surrogates' Courts is not to enlarge the general jurisdiction so that issues not belonging to that court can be tried there, but so that issues which must be determined before the surrogate makes a final decree in a proceeding of which the Surrogate's Court has jurisdiction, may be tried and determined in that court rather than in another court.

To accomplish this, a party must have the right to try certain issues by a jury in Surrogate's Court.

Trial by jury—waiver.

Where objections are filed to the probate of a will which do not incorporate a demand for a trial by jury, the right to such jury trial is waived, and can not be claimed under amended objections filed later in which a jury trial is demanded. *In re Carnright's Will*, 180 A. D. 21, 167 N. Y. Supp. 438.

The right to trial by jury is waived in case of an order of reference to hear and determine made by the surrogate in accordance with section 66, by the expiration of the time to take an appeal from such order. *Re Shedden*, 183 App. Div. 837, 171 N. Y. Supp. 150.

Section 67 should be read in connection with sections 40, 68, 69.

Trial by jury. Order in New York county.

In any proceeding in which any controverted question of fact arises, of which any party has constitutional right of trial by jury, and in any proceeding for the probate of a will in which any controverted question of fact arises, the surrogate must make an order directing the trial by jury of such controverted question of fact, if any party appearing in such proceeding seasonably demands the same, and in any proceeding in which any controverted question of fact arises, of which any party has, or has not, constitutional right of trial by jury, the surrogate may, in his discretion, make such order without such demand. The surrogate in such order must direct that such trial be had either before himself and a jury, or at a trial term of the supreme court to be held within the county, or in the county court of the county. Either of the surrogates of the county of New York may, in his discretion, make an order transferring to the supreme court any special proceeding for the probate of a will pending in said county. If the trial shall not take place in the surrogate's court the order must state distinctly and plainly each question of fact to be tried, and shall be the only authority necessary for the trial of such question. The verdict, if not set aside by the judge before whom the question is tried, shall be certified to the surrogate's court by the clerk of the court in which the trial took place, and shall be conclusive except upon appeal.

§ 68, *Sur. Ct. A.* Former § 2538, *Code Civ. Pro.*

A former section provided for a jury trial in a proceeding to sell real estate, and in other cases, but the language was obscure and jury trials were rarely had under it. The section as amended makes a general provision for a jury trial, either before the surrogate, or in the County Court, or in the Supreme Court.

Jury becomes trier of facts.

By the amendments made in 1914 and especially section 68, the verdict of a jury in probate matters is made a matter of right. The jury instead of the surrogate, becomes the trier of the issue of the factum of the will, and the requisite conditions surrounding the exercise of testamentary power. *In re Harlow's Will*, — A. D. —, 168 N. Y. Supp. 131.

Not entitled to trial by jury.

Where the interest of a person, moving to open a decree, is denied, he is not entitled to a jury trial of that issue. *In re Reinhart's Will*, 92 Misc. Rep. 96, 156 N. Y. Supp. 171.

Where a proceeding is brought for a construction of a will as to personal estate, a jury trial may be denied. *Matter of Harden*, 88 Misc. Rep. 421, 150 N. Y. Supp. 743.

Where an attorney petitions to have his lien determined and enforced, there is no right to trial of the question of value of services by jury. *In re White*, 100 Misc. Rep. 56, 166 N. Y. Supp. 158.

In a proceeding brought by an attorney against the representative to have his fees ascertained and paid, there is no right to jury trial. *In re Griffith*, 103 Misc. Rep. 562, 170 N. Y. Supp. 629.

A person seeking to intervene in a probate proceeding alleging that he is a son of the deceased, which is denied, must prove such relationship, and is not entitled to a jury trial of such issue. *Matter of Bitter's Est.*, 154 N. Y. Supp. 975; *In re Lord's Will*, 90 Misc. Rep. 222, 154 N. Y. Supp. 302.

Order for trial by jury.

Rule 7, New York County surrogate's court provides that:

"Within five days after a jury trial is demanded in the objections filed to the probate of a will, the party making the demand shall present on two days' notice of settlement to the attorneys of all parties who have appeared as attorney, a proposed order directing such trial by jury. Such order shall state plainly and concisely the controverted questions of fact to be tried by jury. If a party demanding a trial by jury fails to serve and present a proposed order

as aforesaid, such order may thereafter be presented by any party to the proceeding."

Framing issues for jury trial.

Issues of law have no place among the issues to be framed for a jury trial (N. Y. Co.). *In re White's Will*, 106 Misc. Rep. 210, 174 N. Y. Supp. 424.

Directing trial in supreme court.

In *Matter of Eno's Will*, 94 Misc. Rep. 100, 157 N. Y. Supp. 553, Surrogate Fowler discusses the right of one surrogate in New York County to transfer a jury case to the Supreme Court after trial has been directed in surrogate's court, and denies the order for lack of jurisdiction. On appeal the order in the Eno case was affirmed — App. Div. —, 158 N. Y. Supp. 234, but not upon the ground stated by the surrogate that he had no jurisdiction to transfer the trial to the Supreme Court, but that to grant the motion in that case would have been an abuse of discretion.

Trial by jury; power of surrogate; motion to set aside verdict and for new trial.

The surrogate has jurisdiction to conduct a trial by jury in any case in which he is permitted or required by this act to order such trial, and in any case where he shall conduct such trial the same shall be had before the surrogate and a jury, and the trial shall proceed in the same manner as if such trial were had in the supreme court at a trial term thereof held in and for the county of such surrogate.

The provisions of law relating to trial of a civil action by the supreme court and a jury, and to a motion for new trial, shall apply to surrogates' courts and to the proceedings therein so far as they can be applied to the substance and subject-matter of such proceedings without regard to form, but the surrogate shall have no power to set aside a verdict or to grant a motion for a new trial in any proceeding in which the trial took place in a court other than the surrogate's court.

§ 69, *Sur. Ct. A.* Former § 2539, *Code Civ. Pro.*

Motion for new trial.

By Surrogate Fowler:

"At the close of the evidence I directed a verdict on all the questions so put to the jury, substantially in favor of the will.

I then directed *mero motu* the proponent to move, pursuant to section 1233, C. C. P., for judgment at a late day in the term on the answers of the jury (duly subscribed by the foreman and the jurors), and at the same time I directed the contestant to move for a new trial at a day deferred on the minutes, pursuant to section 998, C. C. P.

“ I believe that is the proper practice, and that section 1233, C. C. P., should be held to apply to verdicts rendered by a jury on the controverted issues of fact put to them in this court, although, as I pointed out in *Matter of Plate* (Sur.) 156 N. Y. Supp. 999, the answers of a jury to questions are not a special verdict, and not a general verdict. But they more nearly resemble a special verdict, as defined by the Code, than a general verdict.” *In re Dorsey's Will*, 94 Misc. Rep. 566, 157 N. Y. Supp. 662; *In re Eno's Will*, 94 Misc. Rep. 100, 157 N. Y. Supp. 553; *In re Vetter's Will*, 158 N. Y. Supp. 450, 95 Misc. Rep. 63; *Matter of Dunn*, 158 N. Y. Supp. 119.

Motion to set aside verdict.

Where the jury is confronted by a fair conflict of evidence, the surrogate should not set aside a verdict. *In re Chapman*, 99 Misc. Rep. 183, 165 N. Y. Supp. 405.

Motion to set aside verdict on affidavits of jurors.

The general rule to be applied on such motions is stated in *Dalrymple v. Williams*, 63 N. Y. 361, as follows:

“ There are reasons of public policy why jurors should not be heard to impeach their verdicts, whether by showing their mistakes or their misconduct. Neither can they properly be permitted to declare, with a view to affect their verdict, an intent different from that actually expressed by the verdict as rendered in open court. * * * The rule is well established, and at this day rests upon well-understood reasons of public policy, as connected with the administration of justice, that the court will not receive the affidavits of jurymen to prove misconduct on their part, or any act done by them which could tend to impeach or overthrow their verdict. This rule ex-

cludes affidavits to show mistake or error of the jurors in respect to the merits, or irregularity, or misconduct, or that they mistook the effect of their verdict and intended something different. * * * The court draws a distinction between what transpires while the jury are deliberating on their verdict, and what takes place in open court in returning their verdict, holding the statements of jurors admissible as to the latter but not as to the former." *In re Smith*, 184 N. Y. Supp. 696, 113 Misc. Rep. 48.

Other cases in which the general rule with its exceptions has been discussed are *Williams v. Montgomery*, 60 N. Y. 648, *Dean v. Mayor*, 29 App. Div. 350, 51 N. Y. Supp. 586, *People ex rel. Nunns v. County Court*, 188 App. Div. 424, 176 N. Y. Supp. 858; *People v. Sprague*, 217 N. Y. 373; *Zint v. Mulligan*, 140 App. Div. 230, 124 N. Y. Supp. 1016; *Mitchell v. Carter*, 14 Hun, 448; *White, Corbin & Co. v. Jones*, 86 Hun, 57, 34 N. Y. Supp. 203; *Moses v. Central Park, N. & E. R. R. Co.*, 3 Misc. Rep. 322.

Directing verdict by supreme court.

When a trial of a contested will has been certified to the Supreme Court, and a trial has been had and the jury has failed to agree, and the parties have consented that the trial judge might direct a nonsuit or verdict, it is within the power of the trial judge to act under § 68. *In re Strong's Will*, 99 Misc. Rep. 243, 165 N. Y. Supp. 726.

Jury in surrogate's court; how obtained; fees of jurors and officers.

The surrogate may at any time order the drawing of a jury for service in surrogate's court, upon reasonable notice to the parties who have appeared, stating the day, hour and place of such drawing.

For the purpose of procuring the drawing and attendance of a jury, the surrogate shall have all the powers of a justice of the supreme court specified in sections 527 and 528 of the Judiciary Law and also in relation to requiring the attendance of talesmen; and the clerk of the county of the surrogate shall, upon receiving the order of the surrogate, perform such duties in relation thereto as he is required to perform under a like order of a justice of the supreme court as specified in such sections.

Such jury shall be drawn in the presence of the surrogate either in his office or in the office of the county clerk, and the minutes thereof shall be made in

triplicate, and be signed by the surrogate and the county clerk, and one copy thereof filed in the office of the surrogate, one copy filed in the office of the county clerk, and one copy delivered to the sheriff of the county.

The names of the jurors so drawn shall be returned to the jury box by the county clerk, but if any such juror is again drawn for service in any court, the fact that he served as a juror in surrogate's court shall, upon his request, be a sufficient excuse for not being required to again serve.

In counties where by special act an officer other than the county clerk is designated to draw juries and perform corresponding acts, such officer shall cause the necessary jurors to be summoned and drawn as though a justice of the supreme court had made such order.

The provisions of law applicable to the summoning of jurors, the return of the sheriff, the fees of the sheriff and jurors and their payment, in supreme court, shall apply where jurors are drawn and summoned for service in surrogate's court; and where the county clerk is not a salaried officer, he shall be entitled for his services to such compensation as shall be audited by the board or body entitled to fix his compensation.

The number of days' service of each juror in surrogate's court shall be certified to the county clerk by the clerk of the surrogate's court.

§ 70, *Sur. Ct. A.* Former § 2540, *Code Civ. Pro.*

Surrogate's Court being always in session, the surrogate is given the same power to draw a jury which the Supreme Court justice has when a term of the Supreme Court is being held.

No fees for drawing jury.

The surrogate is not entitled to compensation for attending the drawing of a jury. *People ex rel. Noble v. Mitchell*, 170 App. Div. 379, 155 N. Y. Supp. 660, aff'd, 220 N. Y. 86.

¶ 32 Manner of Taking and Preserving Testimony.

Testimony of witness; how taken.

Where it appears to the satisfaction of the surrogate, that the testimony of a witness is material and necessary, the surrogate may, in his discretion, proceed to the place where the witness is, and there, as in open court, take his examination. Such notice of the time and place of taking the examination, as the surrogate prescribes, must be given, by the party applying therefor.

§ 73, *Sur. Ct. A.* Former § 2543, *Code Civ. Pro.*

This section allows the surrogate to take the testimony of a witness, sick or well, in any place within the State where the witness may be. Additional power is given by subdivision 12 of section 20 (¶ 6), to take testimony at any place within the

State. The next section (§ 74) provides for the taking of testimony in another county by the surrogate of that county, in cases where the surrogate of original jurisdiction is not willing or able to go to that county himself to take the testimony, but only in cases where there is no contest. The clerk of the court may take the depositions of subscribing witnesses to a will when there is no contest. See § 32, subds. 5 and 8 (¶ 12).

In New York county assistant or referee may take testimony.

The surrogate of the county of New York may, on the written consent of all parties appearing in a probate case, appoint a referee, or may, in his discretion, direct an assistant to take and report the testimony, but without authority to pass upon the issues involved therein.

§ 66, *Sur. Ct. A.* Former § 2536, *Code Civ. Pro.*

Taking testimony before assistant to surrogate in New York county.

The assistant to the surrogate does not receive his authority to take testimony in a probate matter from this section, but from chap. 201, Laws 1850, sec. 1 and by chap. 410, Laws of 1882, sec. 1182. *In re Weeds Est.*, 107 Misc. 595, 177 N. Y. Supp. 93.

It is open to serious doubt whether the surrogate can direct the assistant to take testimony in a contested probate proceeding of persons who are not witnesses to the will. *Matter of Gillender*, 98 Misc. Rep. 521, 162 N. Y. Supp. 955.

Id.; by the surrogate of another county.

Where the surrogate has good reason to believe that a subscribing or a material witness who is in another county of the state cannot conveniently attend before him, and no issue is pending therein, he may make an order, directing that the witness be examined before the surrogate of the county in which he is; specifying by an order the nature and manner of the examination. A copy of the order must be transmitted by him to the surrogate designated in the order, together with the original will, where the testimony relates to the execution of a written will. The examination may be taken by one of the clerks described in section 32 of this act. The examination, after it is reduced to writing and subscribed by the witness or otherwise duly authenticated, together with a statement of the proceedings upon the execution of the order, must be certified by the surrogate or clerk taking the examination, attested by the seal of his court, and returned without delay, with the original will, if any, to the surrogate who

directed the examination, who must file the same in his office. A surrogate may appoint a referee to take the testimony, who shall report the same to the surrogate who makes the appointment. An examination so taken has the same effect as if it was taken by commission.

§ 74, *Sur. Ct. A.* Former § 2544, *Code Civ. Pro.*

The section applies to any case where the witness is in another county and the surrogate of original jurisdiction does not desire to take the testimony himself, or by the aid of his clerk. See § 73.

The order directs the examination before the surrogate, but the section provides that the clerk may take it.

Bequest does not disqualify witness.

A person is not disqualified or excused from testifying respecting the execution of a will, by a provision therein, whether it is beneficial to him or otherwise.

§ 75, *Sur. Ct. A.* Former § 2545, *Code Civ. Pro.*

Disqualification of witness under §§ 347, and 351-354, Civ. Pr. A.

The disqualification of witnesses under section 347 and of nurses, clergymen, doctors and lawyers is discussed under the various proceedings in which those questions arise.

Uncontroverted allegations constitute due proof.

Except as otherwise provided by law, a petition, affidavit or account filed in a special proceeding shall be due proof of the facts therein stated, unless controverted by answer, objection or other proof.

§ 76, *Sur. Ct. A.* Former § 2546, *Code Civ. Pro.*

Many practitioners have always made oral proof of allegations in a petition or account, but this section obviates that supposed necessity. There is no doubt but that in the early history of the court when pleadings were oral and therefore not verified, it was necessary to offer proof of the jurisdictional and other allegations. Under this section, if the practitioner is careful in drawing his papers to set up all the facts necessary to be shown to get jurisdiction, or the decree or order asked for, he will not need to produce his client to make oral proof of any of such allegations, unless such statements

or allegations are controverted by answer or objection. All petitions, answers and objections are required to be verified. § 49, ¶ 25.

Sufficient denial.

Facts are not sufficiently controverted by an affidavit alleging a conclusion upon information and belief. *Matter of Hyde*, 155 N. Y. Supp. 495, 169 App. Div. 568.

This case was reversed in 218 N. Y. 55, 159 N. Y. Supp. 581, where it was held that the rule of pleading applied was too strict, and that under the facts disclosed in the papers and proceeding the allegation was sufficiently controverted.

Admissions by pleadings or orally.

An admission by an administrator or executor is not binding as against the estate unless made while he was engaged in his representative capacity in the performance of a duty to which the admission was pertinent so as to constitute a part of the *res gestae*. *Davis v. Gallagher*, 124 N. Y. 487, rev'g, 55 Hun, 593; *More v. Finch*, 65 Hun, 406, 48 N. Y. St. Repr. 23, 20 N. Y. Supp. 164.

Obtaining testimony by deposition taken within or without the state.

The surrogate in a proper case has the right to direct the deposition of a party to a special proceeding to be taken to be used in that proceeding. Such right, however, by special provision of law cannot be exercised to take the evidence of a witness to a will who is within the State and physically able to appear in person before the surrogate or a referee appointed by him. Where the surrogate may exercise the right to cause the deposition of a witness to be taken, the procedure is governed by the Civil Prac. A., sections 288 *et seq.*

Special provisions are made for taking the testimony of a witness who is within the State, before the surrogate, the surrogate's clerk, a referee, or before the surrogate of another county by sections 73, 74, Sur. Ct. A.

Witness out of state. See probate, ¶ 50.

In a proper case the surrogate may issue a commission to take the deposition of a witness who is not within the State to be used in a proceeding before him. *Matter of Plumb*, 135 N. Y. 661.

In issuing a commission and in taking such deposition sections 288 *et seq.* Civ. Prac. A. apply.

The provisions of section 291 *et seq.* Civ. Pr. A. regarding granting commission to take testimony are made applicable to Surrogates' Courts, but it will be found that the practice has been much changed by the Civil Practice Act.

A motion for a commission must be decided on the affidavits presented to the court, and should be granted if it appears that there are witnesses not in the State whose testimony is material to the applicant, and that the application is made in good faith.

The surrogate can not arbitrarily limit the time in which such motion can be made. *In re Shannon's Will*, 180 App. Div. 214, 167 N. Y. Supp. 472.

Consult Rules of Civil Practice. 127 *et seq.* as to proceedings on taking testimony out of the State by commission. Instead of attaching the sections of the code as heretofore required, there must be sent with the commission a copy of Title 15 of the Rules and a copy of Article 29 of the Civil Practice Act.

Commission to examine on oral questions will be granted on payment of expenses.

The court properly scrutinizes an application for a commission to examine witnesses without the State upon oral questions, or for an open commission which neither requires that the witnesses be named nor limits their number, to the end that a party having the election whether to bring an action here or elsewhere should not be permitted, after bringing the action in this jurisdiction, to transfer the place of trial to another forum, and to the end, also, that the adverse party should not be put to the expense or inconvenience incident to

the proper execution of such commissions, where it can be fairly seen that a commission on written interrogatories will fully answer the ends of justice. *Ordway v. Radigan*, 114 App. Div. 538, 100 N. Y. Supp. 121; *Frownfelker v. D., L. & W. R. R. Co.*, 81 App. Div. 67, 80 N. Y. Supp. 711.

In any case where the testimony of a witness is taken by commission, whether upon written interrogatories, or in the form of a deposition on oral questions, or under an open commission, neither the court nor the jury has an opportunity to scrutinize the testimony of the witnesses by their appearance or conduct upon the stand. That objection to the issuance of a commission applies alike to the various classes of commissions authorized. The commissions which have heretofore been regarded with disfavor by the courts are open commissions, in which no witnesses are named and where there is no limit to the number that may be produced or examined by either party. In many cases the ends of justice will be subserved by a liberal exercise of the authority to issue commissions to take the testimony of designated witnesses on oral questions; due regard being had, however, to the rights of the adverse party. When it becomes necessary to take the testimony of a witness without the State, it is apparent that the class of commission to be issued must rest in judicial discretion, to be exercised according to the particular facts presented. There is less likelihood that a witness will testify falsely if examined orally than if examined on written interrogatories; and, if he should, it is more likely that a cross-examination orally will be effective than if it be confined to written interrogatories. The only serious objection to issuing a commission to examine designated witnesses on oral questions is the expense to which the adverse party may be subjected in sending counsel familiar with the facts to attend the execution of the commission, and it may well be that in some instances it will be necessary for the party, or for one representing him, familiar with the subject matter of the litigation, to likewise attend, in order that his counsel might be enabled to properly cross-examine the witnesses. These ob-

jections may be met, according to the justice of the case and in the discretion of the court, by requiring the moving party to pay a reasonable amount for such expenses as a condition of granting the commission upon oral questions, instead of upon written interrogatories. *Deery v. Byrne*, 120 App. Div. 6, 104 N. Y. Supp. 836.

Filing testimony taken out of court by commission.

Where in any matter before the surrogate or in a surrogate's court the testimony of any witness shall be taken by or on commission, the same, together with the commission on which it is taken, shall be duly filed in the office of the surrogate but need not be recorded.

§ 77, *Sur. Ct. A.* Former § 2547, *Code Civ. Pro.*

When testimony is taken by a stenographer, see §§ 27, 28, ¶ 10.

Decision by surrogate after trial without a jury.

Upon a trial before the surrogate without a jury, the surrogate must file in his office his decision in writing which shall direct the decree to be entered, which, except for such direction, need not contain either the facts found or the conclusions of law. No party shall have the right, after the close of the trial, to request a finding upon any question of fact or a ruling upon a question of law. For the purposes of appeal or other form of review, the decree made by the surrogate upon the trial by him of an issue of fact shall have the same effect as the general verdict of a jury would have if the same issues were triable before a court and a jury and were so tried and a general verdict rendered thereon.

§ 71, *Sur. Ct. A.* Former § 2541, *Code Civ. Pro.*

This section taken with section 72 makes it unnecessary for the surrogate to make or pass upon findings of fact and law, but enables him to make a decision in the nature of a general verdict.

This section does not prohibit the surrogate from making findings but relieves him of the necessity of making them. Surrogates often make them when the nature of the questions involved makes it desirable. *In re Amend's Est.*, 100 Misc. Rep. 90, 165 N. Y. Supp. 76; *Matter of Hubbard*, 89 Misc. Rep. 711, 153 N. Y. Supp. 1097.

No decision can be taken after a party's death.

A judgment shall not be entered against a party, who dies before a verdict, report or decision is actually rendered against him. In that case the verdict, report or decision is void.

From § 478, Civ. Prac. A. From former § 765, Code Civ. Pro.

Exceptions upon a trial.

An exception may be taken to a ruling by a surrogate upon the trial by him of an issue of fact, in a case where such an exception may be taken to a ruling of the supreme court upon a trial of a civil action, without a jury, of an issue of fact. The provisions of law, relating to the manner and effect of taking such an exception, and the settlement of a case containing the exceptions, apply to such a trial before a surrogate; for which purpose, the decree is regarded as a judgment, and notice of an exception may be filed in the surrogate's office.

§ 72, Sur. Ct. A. Former § 2542, Code Civ. Pro.

Read this section in connection with section 71.

CHAPTER IX.

Decrees and Orders; Their Force and Effect; Enforcement of Decree by Execution, or by Contempt Proceedings.

- ¶ 33. § 78. Decree and order defined.
 § 79. When evidence of assets.
 § 80. Force and effect.
 § 81. Docket and assignment.
 Recording transfers of interest in decedents' estates.
 § 82. Satisfaction, wholly or partly.
 ¶ 34. § 83. Enforcement of decree by execution.
 Exempt homestead.
 § 87. Stayed by appeal.
 § 84. Enforcement of decree by punishment for contempt.
 Proceedings supplementary to execution.
 ¶ 35. Proceedings to obtain leave to issue execution.
 How and when execution may issue.

¶ 33 Decree and Order Defined.**Definition of decree and order; how order enforced.**

The determination of the rights of the parties to a special proceeding in a surrogate's court, is a decree.

A direction of a surrogate's court, made or entered in writing, and not included in a decree, is an order. It may be enforced in like manner as a similar order, made by the supreme court in an action.

§ 78, *Sur. Ct. A.* Former § 2548, *Code Civ. Pro.*

Decree should recite due service of citation.

It is important that every decree should recite the fact that all parties have been served with citation. It sometimes happens that proof of service is mislaid or becomes lost or even may be willfully taken away by some designing person.

By the Surrogates' Court Act, § 43 (¶ 16), if such proof of service cannot be found and it is duly recited in the decree that service was made, such recital is presumptive proof of service. *Sisco v. Martin*, 61 App. Div. 502, 70 N. Y. Supp. 597.

Decree or order; when evidence of assets.

A decree directing payment by an executor, administrator, guardian or testamentary trustee, to a creditor of, or a person interested in, the estate or fund,

or an order permitting a judgment creditor to issue an execution against an executor or administrator, is, except upon an appeal therefrom, conclusive evidence that there are sufficient assets in his hands to satisfy the sum which the decree directs him to pay, or for which the order permits the execution to issue. A decree charging a deceased executor, administrator, guardian or trustee with assets upon an accounting under section 255 of this act, is not evidence of assets in the hands of such accounting executor, administrator, guardian or trustee.

§ 79, *Sur. Ct. A.* Former § 2549, *Code Civ. Pro.*

Force and effect of a decree of surrogate's court.

Every decree of a surrogate's court is conclusive as to all matters embraced therein against every person of whom jurisdiction was obtained.

§ 80, *Sur. Ct. A.* Former § 2550, *Code Civ. Pro.*

Not subject to collateral attack.

A decree can not be attacked collaterally for an irregularity in the service of the citation. *Wetmore v. Parker*, 52 N. Y. 450.

Section 80 includes a decree of probate formerly specially covered by section 2625 Code of Civil Procedure.

In *Wadsworth v. Hinchcliff*, 218 N. Y. 589, it was held that former section 2625 Code Civ. Pro. precluded the trial of its validity of a will in a partition action where resort had not been had to section 2653-a, and that the decree of the surrogate's court admitting a will to probate was final, unless the parties resorted to their jury trial under section 2653-a Code of Civ. Pro.

Grant of probate or of administration is not conclusive as to the death of a testator or intestate, nor as to the last domicile or residence of the deceased. *Matter of Mesay Hernandez*, 149 N. Y. Supp. 536, 87 Misc. Rep. 242, aff'd, 159 N. Y. Supp. 59, 172 App. Div. 467, aff'd, 219 N. Y. 566.

Force and effect of decree of probate under former law. See ¶ 63.

Up to the time of the amendment of section 2625 of this chapter by Laws of 1910, chapter 578, the effect of a decree admitting a will to probate was not the same as to real property and personal property. It was conclusive as to personal property, except in an action brought under section 2653-a,

and was only presumptive evidence as to real property. By the amendment it became conclusive as to both real and personal property, although the validity of the execution of the will might be re-tried under § 2653-a or in ejectment or partition. Former § 2653-a has been repealed and there can be but one trial of the validity of the execution, and that must be in the probate proceeding.

Some of the cases decided under the former sections were as follows:

The probate of a will which on its face devises real property is not even presumptive evidence of the validity of such devise, and an heir-at-law is in no way prejudiced by such decree. *Matter of Merriam*, 136 N. Y. 58; aff'g, 42 N. Y. St. Repr. 619, 16 N. Y. Supp. 738.

The decree is presumptive evidence only as against persons claiming the real estate who were duly cited. *Dworsky v. Arndstein*, 29 App. Div. 274, 51 N. Y. Supp. 597.

The decree admitting a will to probate is conclusive as to the personalty, unless it is reversed on appeal or revoked by the surrogate. This decree was made upon a verdict of a jury. *Bowen v. Sweeney*, 89 Hun, 359, 35 N. Y. Supp. 400, 69 N. Y. St. Rep. 785; aff'd, 154 N. Y. 780.

The probate of a will does not make every provision in it legal, but only goes to the matters of due execution and testamentary capacity. *Phalen v. U. S. T. Co.*, 100 App. Div. 264, 108 id. 365, 186 N. Y. 178.

Decree or judgment admitting will to probate should be recorded.

It is provided by section 150 (¶ 74), that the decree, order or judgment admitting a will to probate shall be recorded in the Surrogate's Court which has jurisdiction of the estate of the testator.

Decree for money; how docketed; effect; assignment and discharge.

Where a decree directs the payment of a sum of money into court, or to one or more persons therein designated, the surrogate, or the clerk of the surrogate's court, must furnish to any person applying therefor one or more transcripts, duly

attested, stating all the particulars with respect to the decree which are required by law to be entered in the clerk's docket-book, where a judgment for a sum of money is rendered in the supreme court, so far as the provisions of law directing such entries are applicable to such a decree. Each county clerk to whom such a transcript is presented must, upon payment of his fees immediately file it, and docket the decree in the appropriate docket-book kept in his office as prescribed by law for docketing a judgment of the supreme court. The docketing of such a decree has the same force and effect, the lien thereof may be suspended or discharged, and the decree may be assigned or satisfied, as if it were such a judgment.

§ 81, *Sur. Ct. A.* Former § 2551, *Code Civ. Pro.*

Assignment of claim or decree see § 41, *Pers. Prop. Law*, in this paragraph.

Effect of docketing.

A decree docketed in the county clerk's office does not become a judgment and, therefore, merged in a judgment. Two remedies for its enforcement are thus created. *Townsend v. Whitney*, 75 N. Y. 425.

A decree or judgment against the personal representatives creates no lien by virtue thereof upon the real estate of deceased. *Bennett v. Crain*, 41 Hun, 183, 4 N. Y. St. Rep. 158; *James v. Beesly*, 4 Redf. 236; *Lynch v. Patchen*, 3 Dem. 58; *Sharpe v. Freeman*, 45 N. Y. 802.

Interest on a decree.

Interest accrues upon a decree from the date of its entry. *Matter of Ryer*, 120 App. Div. 154, 104 N. Y. Supp. 804.

Decree; partial satisfaction of.

Upon the application of any person interested, there may be recorded in the surrogate's office any instrument acknowledging payment of moneys pursuant to the provisions of decrees for the judicial settlement of accounts of executors, administrators, testamentary trustees and guardians. Every such instrument to be recorded shall be acknowledged, or proved and duly certified, and the record thereof, or a certified copy of such record, shall be presumptive evidence of the contents of such instrument and its due execution, and shall be presumptively a satisfaction and discharge of such decree as to any payment of money or delivery of property therein acknowledged.

§ 82, *Sur. Ct. A.* Former § 2552, *Code Civ. Pro.*

Satisfaction of decree.

A decree directing payment or distribution is commonly considered satisfied and discharged in the surrogate's office when the papers are filed or recorded showing complete performance thereof. This is done by filing receipts and releases executed and acknowledged by the various distributees showing performance of the terms of the decree.

Where a surety pays the obligation of his principal the decree is not thereby satisfied, but the surety becomes subrogated to the rights of the creditor. *Rapp v. Masten*, 4 Redf. 76.

A decree may be docketed in the county clerk's office and then in many respects it is treated as a judgment of a court of record. It is provided in section 81, that "the docketing of such a decree has the same force and effect, the lien thereof may be suspended or discharged, and the decree may be assigned or satisfied as if it was such a judgment."

Section 530, Civ. Pr. Act, prescribes how a judgment may be satisfied of record.

Certificate of discharge or satisfaction by surrogate's court.

It is common practice for persons to ask the clerk of the court for a certificate that a decree has been satisfied and discharged. Under section 9 of chapter 782, Laws of 1867, there was a requirement that the surrogate should give such a certificate. More or less of that chapter was written into the Code, and with the enactment of the Consolidated Laws the chapter was repealed. There is no requirement that the clerk should give such a certificate, and there ought to be none, for to do it would require him to pass upon the validity and effect of a paper filed, which later might be subject to attack. The proper certificate to make is that certain papers, describing them, have been filed, and annexing a certified copy when desired.

Decree or order, enforcement.

A decree or order may be enforced by the issue of execution.

¶ 34.

Either may also be enforced in proper cases by proceedings for contempt of court. ¶ 34.

Enforcement of decree by representative of distributee.

Where a distributee dies before he has received payment under the decree, an action may be maintained in Supreme Court to enforce such decree, or he may proceed under section 84 Civil Prac. Act. *Koenig v. Wagener*, 126 App. Div. 772, 111 N. Y. Supp. 116.

Recording of assignments, mortgages, conveyances, or other transfers of interest in decedents' estates.

§ 1. Every conveyance, assignment or other transfer of and every mortgage or other charge upon the interest, or any part thereof, of any person in the estate of a decedent which is situated within this state, shall be in writing, and shall be acknowledged or proved in the manner required to entitle conveyances of real property to be recorded. Any such instrument may also be recorded as hereinafter provided; and if not so recorded it is void against any subsequent purchaser or mortgagee of the same interest or any part thereof, in good faith and for a valuable consideration, whose conveyance or mortgage is first duly recorded. If such interest is entirely in the personal property of a decedent, the conveyance or mortgage shall be recorded in the office of the surrogate issuing letters testamentary or letters of administration upon the said decedent's estate, or if no such letters have been issued, then in the office of the surrogate having jurisdiction to issue the same. If such interest is in both the personal and the real property of a decedent, the conveyance or mortgage shall be recorded in the office of the said surrogate and also in the office of the county clerk. Such a conveyance or mortgage when so recorded, shall be indexed under the name of the decedent, in a book to be kept for that purpose by each recording officer. The person presenting any such instrument for record shall pay to the clerk of the surrogate's court a fee of ten cents for each folio.

§ 32, *Personal Property Law*.

A similar provision is found in § 274 of the Real Property Law.

The provision in this section with respect to the good faith of a "subsequent purchaser" clearly has reference to the knowledge which such purchaser had at the time of the purchase, and not at the time of recording the instrument.

The burden of showing notice or want of good faith rests upon those who seek to impeach the record title. *Van Buren v. Wensley*, 102 Misc. Rep. 248, 169 N. Y. Supp. 789.

Assignment of distributive share.

An administrator may effectively assign his distributive share, although he afterwards commits devastavit. *Muller v. National Surety Co.*, 154 N. Y. Supp. 1096, 91 Misc. Rep. 544, aff'd, — App. Div. —, 157 N. Y. Supp. 1137.

Priority of several assignments.

In a case where several assignments of an interest had been made and recorded and afterwards a deed of the interest of the devisee in certain real estate accompanying the estate was made and recorded, the rights of the several parties were determined on the judicial settlement. *Matter of Bedell*, 67 Misc. Rep. 24.

¶ 34 Enforcement of Decree by Execution; When Stayed by Appeal; Enforcement by Contempt Proceedings.

Enforcement of decree by execution.

A decree directing the payment of a sum of money into court, or to one or more parties, may be enforced by an execution against the property of the party directed to make the payment. The execution must be issued by the surrogate, or the clerk of the surrogate's court, under the seal of the court, and must be made returnable to the court. In all other respects the provisions of law relating to an execution against the property of a judgment-debtor issued upon a judgment of the supreme court, and the proceedings to collect it, apply to an execution issued from the surrogate's court, and the collection thereof, the decree being, for that purpose, regarded as a judgment; except that proceedings in proceedings supplementary to execution, if founded upon such a decree, must be taken as if the decree was a judgment of the county court, or, in the city of New York, of the supreme court.

§ 83, *Sur. Ct. A.* Former § 2553, *Code Civ. Pro.*

Leave to issue need not be obtained.

Sections 151, 152, 153 of the Decedents Estate Law apply where a judgment has been rendered against the executor or

administrator, not where a decree of the Surrogate's Court has directed him to pay money. *Peyser v. Wendt*, 2 Dem. 221; *Joel v. Ritterman*, 2 Dem. 242.

Execution for costs.

Section 83 authorizes the issuance of an execution to enforce the payment of moneys directed by the decree of a Surrogate's Court, whether the sum to be paid consist in costs alone, or otherwise. *Matter of Humfreville* (154 N. Y. 115), decided, under section 2554 of the Code, that a decree of that court for the payment of costs could not be enforced by imprisonment, in proceedings to punish for contempt; the ground for the decision being that section 15 of the Code forbade, generally, the enforcement of a decree for costs by imprisonment. *Matter of Hirsch*, 185 N. Y. 598; aff'g, 112 App. Div. 914.

Enforcing decree by representative of distributee.

A decree may be enforced by the representative under this section or by an action in Supreme Court. *Koenig v. Wagner*, 126 App. Div. 772, 111 N. Y. Supp. 116.

General execution under § 83. See ¶ 125.

The execution to be issued on a decree is governed by section 83, and must be "against the property of the party directed to make the payment," even though, by the terms of the decree, such party is required to pay out of the assets of an estate in his hands for administration. *Matter of Waring*, 7 Misc. Rep. 502, 58 N. Y. St. Repr. 797, 28 N. Y. Supp. 393; *Bennett v. Crain*, 41 Hun, 183, 186, 4 N. Y. St. Repr. 158.

Motion to vacate.

Motion to vacate an execution in the Supreme Court which was denied for lack of jurisdiction, may be granted by surrogate. *In re McTevey's Est.*, 93 Misc. Rep. 384, 158 N. Y. Supp. 136.

Exemption of real and personal property from execution.

Consult section 665 *et seq.*, Civil Practice Act.

Pension money, in certain cases. *Yates Co. Nat. Bank v. Carpenter*, 119 N. Y. 550.

Homestead; when exempted.

A lot of land, with one or more buildings thereon, not exceeding in value \$1,000, owned, and occupied as a residence, by a householder having a family, and heretofore designated as an exempt homestead, as prescribed by law, or hereafter designated for that purpose, as prescribed in the next section, is exempt from sale by virtue of an execution, issued upon a judgment, recovered for a debt contracted after the 30th day of April, 1850; unless the judgment was recovered wholly for a debt or debts, contracted before the designation of the property, or for the purchase-money thereof. But no property heretofore or hereafter designated as an exempt homestead, as prescribed by law, or by the next section, shall be exempt from taxation, or from sale for non-payment of taxes or assessments. § 671, *Civ. Prac. A.*

How exempt homestead designated.

In order to designate property, to be exempted as prescribed in the last section, a conveyance thereof, stating, in substance, that it is designed to be held as a homestead, exempt from sale by virtue of an execution, must be recorded, as prescribed by law; or a notice, containing a full description of the property, and stating that it is designed to be so held, must be subscribed by the owner, acknowledged or proved, and certified, in like manner as a deed to be recorded, in the county where the property is situated; and must be recorded in the office of the clerk of that county, in a book kept for that purpose, and styled the "homestead exemption book." § 672, *Civ. Prac. A.*

Married woman's homestead; when exempted.

A lot of land, with one or more buildings thereon, owned by a married woman, and occupied by her as a residence, may be designated as her exempt homestead, as prescribed in the last section; and the property so designated is exempt from sale, by virtue of an execution, under the same circumstances, and subject to the same exceptions, as the homestead of a householder having a family. § 673, *Civ. Prac. A.*

When exemption to continue after owner's death.

The exemption, prescribed by the last three sections, continues, after the death of the person in whose favor the property was exempted, as follows:

1. If the decedent was a woman, it continues, for the benefit of her surviving children, until the majority of the youngest surviving child.
2. If the decedent was a man, it continues, for the benefit of his widow and surviving children, until the majority of the youngest surviving child, and until the death of the widow.

But the exemption ceases earlier, if the property ceases to be occupied, as a residence, by a person for whose benefit it may so continue, except as otherwise prescribed in the next section. § 674, *Civ. Prac. A.*

When execution of decree or order is stayed by appeal.

An appeal from a decree or an order directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court; or an attorney or counsel employed therein, for disobedience to a direction of the surrogate's court, or for neglect of duty; or directing the commitment of a person refusing to obey a subpoena, or to testify when required according to law; does not stay the execution of the decree or order appealed from unless the appellant gives the undertaking required by section 300 of this act.

An appeal from a decree of a surrogate admitting a will to probate, or granting letters testamentary, or letters of administration, or from an order or judgment of the appellate division of the supreme court affirming a decree of the surrogate admitting a will to probate, or granting letters testamentary or letters of administration does not stay the issuing of letters where, in the opinion of the surrogate manifested by an order, the preservation of the estate requires that the letters should issue.

An appeal from a decree revoking letters testamentary, letters of administration, or letters of guardianship; or from a decree or an order, suspending an executor, administrator, or guardian, or removing or suspending a testamentary trustee, or appointing a temporary administrator, or an appraiser of personal property does not stay the execution of the decree or order appealed from.

Except as otherwise expressly prescribed in this act a perfected appeal has the same effect, as a stay of the proceedings to enforce the decree or order appealed from a perfected appeal from a judgment.

§ 87, *Sur. Ct. A.* Former § 2557, *Code Civ. Pro.*

Consult paragraph 102.

Letters testamentary cannot be issued where an appeal has been taken to the Court of Appeals from the decree granting probate and the proper bond has been given. *Matter of Gihon*, 29 Misc. Rep. 273, 61 N. Y. Supp. 244; aff'd, 49 App. Div. 635, 63 N. Y. Supp. 1108.

The pending of an appeal, where there has been no stay, does not prevent issue of execution. The case of *Curtis v. Stilwell* (32 Barb. 354), holding to the contrary, was reversed (25 How. Pr. 595). *Matter of Morey*, 6 Dem. 287, 10 N. Y. St. Repr. 693.

Enforcement of decree by punishment for contempt.

In either of the following cases, a decree of a surrogate's court directing the payment of money, or requiring the performance of any other act, may be enforced by serving a certified copy thereof upon the party against whom it is rendered, or the officer or person who is required thereby, or by law, to obey it; and if he refuses or wilfully neglects to obey it, by punishing him for a contempt of court:

1. Where it cannot be enforced by execution, as prescribed in the last section.
2. Where part of it cannot be so enforced by execution; in which case, the part or parts which cannot be so enforced may be enforced as prescribed in this section.
3. Where an execution issued as prescribed in the last section to the sheriff of the surrogate's county has been returned by him wholly or partly unsatisfied.
4. Where the delinquent is an executor, administrator, guardian, or testamentary trustee, and the decree relates to the fund or estate, in which case the surrogate may enforce the decree as prescribed in this section, either without issuing an execution, or after the return of an execution, as he thinks proper.

If the delinquent has given an official bond, his imprisonment, by virtue of proceedings to punish him for a contempt, as prescribed in this section, or a levy upon his property by virtue of an execution, issued as prescribed in the last section, does not bar, suspend, or otherwise affect an action against the sureties on his official bond. § 84, *Sur. Ct. A. Former* § 2554, *Code Civ. Pro.*

Serving certified copy decree.

The proper method of serving a decree so that a person may be brought into contempt for failure to obey it is to serve a certified copy thereof. The original decree must be filed and entered in the surrogate's office, and cannot be taken away for the purpose of showing the original when a copy is served. It is sufficient to serve a certified copy.

See *Sudlow v. Pinckney*, 1 Dem. 158; *Woodhouse v. Woodhouse*, 5 Redf. 131.

Service of a copy of an order to pay money on behalf of a person is not a "personal demand" required by section 756 of the Judiciary Law. *Union Trust Co. v. Gage*, 6 Dem. 358, 15 N. Y. St. Repr. 718.

Extent of inquiry on application for order to punish.

In the *Matter of Isaac*, 103 Misc. Rep. 184, 169 N. Y. Supp. 1066, Mr Surrogate Fowler said:

"The contention of the administrator raises the preliminary question as to whether, upon this application to punish him for contempt because of his failure

to comply with the decree of this court directing distribution of the estate of the deceased, the surrogate should determine the validity and sufficiency of the reasons alleged for the failure of the administrator to comply with the terms of the decree or should confine himself to the determination of the existence of the jurisdictional facts and the compliance or non-compliance of the administrator with the provisions of the decree. In *Matter of Snyder*, 103 N. Y. 178, the court said that:

“The investigation before the surrogate might properly have been limited to the matter contained in it; i. e., the service of the decree and the facts of the neglect constituting its violation.”

“And in *Matter of Pye*, 18 App. Div. 306, 46 N. Y. Supp. 350, the court said that:

“The motion to charge the appellant with contempt, having been regularly conducted, presented for consideration the question only whether the court had jurisdiction to make the order with which his disobedience was charged and established in such manner as to subject him to that implication.”

“From these cases it would appear that the surrogate may refuse to consider any question upon this application except the jurisdiction of the court to make the decree which directed distribution of the estate of the deceased and the alleged failure of the administrator to comply with the provisions of that decree.”

No punishment for nonpayment of interlocutory costs.

A person shall not be arrested or imprisoned, for the non-payment of costs, awarded otherwise than by a final judgment, or a final order, made in a special proceeding instituted by state writ, except where an attorney, counselor, or other officer of the court, is ordered to pay costs for misconduct as such, or a witness is ordered to pay costs on an attachment for non-attendance.

§ 20, *Civil Rights Law*.

This section applies to a surrogate's decree directing payment of costs solely. *Matter of Humfreville*, 154 N. Y. 115; revg. 19 App. Div. 381, 46 N. Y. Supp. 439.

Costs allowed against an administrator on a motion can only be collected by execution and not by contempt proceedings. *Matter of Lippincott*, 5 Dem. 299.

A temporary administrator not punished when he had no funds. *Matter of Grant*, 130 App. Div. 706, 115 N. Y. Supp. 283.

No arrest or imprisonment for nonpayment of contract debt.

Except in a case where it is otherwise specially prescribed by law, a person shall not be arrested or imprisoned for disobedience to a judgment or order,

requiring the payment of money due upon a contract, express or implied, or as damages for nonperformance of a contract. § 21, *Civil Rights Law*.

That part of a decree which awards costs against an executor personally is a "money judgment," and can be enforced by execution only. *Matter of Feehan*, 36 Misc. Rep. 614, 73 N. Y. Supp. 1126.

Execution should be issued.

A decree awarding costs against objecting creditors cannot be enforced by contempt proceedings until an execution has been returned unsatisfied. *Matter of Dissoway*, 91 N. Y. 235.

While a surrogate may punish for contempt in some cases without the prior issuing of an execution, a sound discretion requires the preliminary issue of execution. *Matter of Keltinger*, 1 Dem. 433.

A surrogate has power to punish an administrator for contempt for failure to pay an amount allowed a special guardian by and under a decree. *Matter of Kurtzman*, 2 N. Y. St. Repr. 655.

Punishment for contempt when representative fails to pay his debt to deceased.

The liability of the indebted executor is not for all purposes the same as if he had actually received so much money, and if he was at all times from and after the time when he qualified as executor insolvent and unable to pay the debt, he cannot be punished as for contempt for his refusal to pay and distribute such sum of money because of such insolvency. *Baucus v. Stover*, 89 N. Y. 1; *Matter of Ockershausen*, 59 Hun, 200; *Joel v. Ritterman*, 5 Redf. 136. In such a case, that is, where total insolvency existed during all of the time while he was an executor, no recovery can be had against his sureties for his failure to apply the amount of his debt as directed by the decree. *Baucus v. Barr*, 45 Hun, 582; aff'd, 107 N. Y. 624. The principle of these decisions is that an executor is not required to

be solvent, that it is sufficient if he shall be honest and diligent, and that the debt due from him to the estate of his testator is to be treated as an asset, the value of which is to be measured, like any similar asset, by its collectibility. Therefore, where it appeared that an executor was insolvent when appointed, but afterward became and for a time continued to be solvent, it was determined that he was properly chargeable with the amount of his debt to the testator as an asset in his hands to be distributed and that his sureties were liable for his default. *Keegan v. Smith*, 60 App. Div. 168; aff'd, 172 N. Y. 624; *Matter of Snyder*, 34 Hun, 302; aff'd, 103 N. Y. 178; *Matter of Holmes*, 79 App. Div. 267; aff'd, 176 N. Y. 604.

The remedy was invoked and approved in a case where an executor transferred a specific legacy made to him, to the prejudice of creditors. *Matter of Pye*, 18 App. Div. 306; aff'd, 154 N. Y. 773. It is true that the surrogate may, in a proper case, refuse to award this remedy (*Matter of Battle*, 5 Dem. 447), and that it should not be used for mere purposes of oppression, contrary to the spirit of our laws on the subject of imprisonment for debt. *Matter of David*, 44 Misc. Rep. 337, 89 N. Y. Supp. 927.

Where the alleged contempt consisted of neglect to pay a debt adjudged to be due the estate from the executor, it was held that the burden was upon the executor to prove his defense of insolvency. *Matter of Strong*, 111 App. Div. 281; aff'd, 186 N. Y. 584.

Applied generally.

The question of the ability of the representative to pay the amount decreed should not be determined on the motion to punish but afterward on a motion to be discharged. See § 775, Judiciary Law. *Matter of Boyer*, 74 Misc. Rep. 329, 134 N. Y. Supp. 231.

Where a decree had been made finding money in the hands of an executor, which he had misappropriated and then transferred his property, punishment for contempt for not paying

over upheld — in the face of allegation that the executor was insolvent. *Matter of Snyder*, 103 N. Y. 178.

Where the amount decreed to be paid an infant is not ordered paid into court, and the representative has not converted the money, he will not be charged with interest upon it. *Matter of Schweibert*, 25 Misc. Rep. 464, 55 N. Y. Supp. 649.

Where on a contest of a will the executor is ordered to pay stenographer's fees, want of assets is a good defense in a proceeding to punish him for contempt. *Matter of Davidson*, 5 Dem. 224.

A surrogate is not bound to order imprisonment, but should be guided by a wise discretion exercised in view of the facts of each case. *Matter of Battle*, 5 Dem. 447, 10 N. Y. St. Repr. 167.

Where an appeal is taken from a decree or the time to appeal has not expired, and the legatees or distributees move for payment under the decree, they should be required to give the representative security. *Matter of Armstrong*, 32 N. Y. St. Repr. 441.

An administrator was charged costs personally on judicial settlement, and the surrogate denied an application to punish for contempt. *Matter of Banning*, 108 App. Div. 12, 95 N. Y. Supp. 467.

Compliance with decree will be enforced by fine to the amount of the interest of the moving party, as the party who is aggrieved. *In re Ball*, 94 Misc. Rep. 112, 158 N. Y. Supp. 1095.

When a fine is imposed for not turning over property, and the fine is paid, such executor should have credit therefor in his account. *Matter of Van Houten*, 18 App. Div. 306, 46 N. Y. Supp. 350.

Proceedings supplementary to execution against property may be instituted before surrogate or special surrogate where execution was issued out of surrogate's court.

Consult Civil Prac. A., § 773 *et seq.*

Section 778, Civ. Prac. A., gives the surrogate power to issue an order in supplementary proceedings where the execution was issued out of the Surrogate's Court.

By the same section the special surrogate seems to be invested with the same power as the county judge in relation to all such proceedings no matter from what court the execution issues.

Enforcement of decree by supplementary proceedings.

By section 83, supplementary proceedings may be maintained on a decree, and for such purpose it shall be considered a judgment of the County Court, except in the city of New York where it shall be proceeded upon as a judgment of the Supreme Court.

Debt against deceased.

A debt against an estate cannot be enforced by supplementary proceedings against an executor or administrator. *Jones v. Arkenburgh*, 112 App. Div. 483, 98 N. Y. Supp. 532.

Neither can a judgment against the representative even for expenses of administration. *Sartorelli v. Ezagni*, 64 Misc. Rep. 115, 118 N. Y. Supp. 46; *Collins v. Beebe*, 54 Hun, 318, 27 N. Y. St. Repr. 4, 7 N. Y. Supp. 442.

Against legatee or distributee.

The provisions of § 785 Civ. Prac. Act are applicable to executions against a legatee or distributee of an estate, and the executors may be examined as third parties. *King v. Burnett*, 102 Misc. Rep. 161, 168 N. Y. Supp. 405.

¶ 35 Proceedings to Obtain Leave to Issue Execution Against a Representative Upon a Judgment.

Leave to issue execution against executor, et cetera.

Except as provided in this section, an execution shall not be issued, upon a judgment for a sum of money, against an executor or administrator, in his representative capacity, until an order permitting it to be issued has been made by the surrogate from whose court the letters were issued. Such an order must specify the sum to be collected, and the execution must be endorsed with a direction to collect that sum. If a judgment be jointly against an executor or administrator in his representative capacity and one or more other parties, execution may be issued thereon, without such order, against such other party or parties, but it must have endorsed thereon a direction not to levy against any property to the possession of which such executor or administrator as such is or may be entitled.

§ 151, *Dec. Est. L.*

Leave to issue execution; how procured; order; and contents thereof.

At least six days' notice of the application for an order specified in the last section, must be personally served upon the executor or administrator, unless it appears that service cannot be so made with due diligence; in which case, notice must be given to such persons, and in such manner, as the surrogate directs, by an order to show cause why the application should not be granted. Where it appears that the assets, after payment of all sums chargeable against them for expenses, and for claims entitled to priority as against the plaintiff, are not or will not be, sufficient to pay all the debts, legacies, or other claims of the class to which the plaintiff's claim belongs, the sum, directed to be collected by the execution, shall not exceed the plaintiff's just proportion of the assets. In that case, one or more orders may be afterwards made in like manner, and one or more executions may be afterwards issued, whenever it appears that the sum, directed to be collected by the first execution, is less than the plaintiff's just proportion.

§ 152, *Dec. Est. L.*

Petition.

The application should be by petition to the surrogate from whose court the letters were issued, and if a notice of less than six days is proper the reason therefor should be stated. The amount of the assets, the amount of the claim, and other facts showing the right to the execution should be set forth.

Order to show cause.

The order to show cause must be directed to the representative, and must be returnable in not less than six days, unless the time is shortened by direction of the surrogate for good cause shown.

Service of the order to show cause.

The order must be served personally upon the representative at least six days before the return day, unless such time is shortened or some other mode of service is directed by the surrogate upon good cause shown.

Hearing.

Where it appears that the assets after payment of all sums chargeable against them for expenses and for claims entitled to priority as against the applicant are not or will not be sufficient to pay all debts, legacies, or other claims of the class to which applicant's claim belongs, the sum directed to be collected by the execution shall not exceed the applicant's just proportion of the assets.

Order for execution.

The execution can only be issued upon an order therefor, which specifies the sum to be collected.

Execution.

The execution must be indorsed with a direction to collect that sum, which is named in the order.

Subsequent orders and executions.

One or more orders may be afterward made in like manner, and one or more executions may be afterward issued, whenever it appears that the sum directed to be collected by the first execution is less than the plaintiff's just proportion.

No preference can be given to a judgment creditor under this section. *Schmitz v. Langhaar*, 24 Hun, 168; aff'd, 88 N. Y. 503; *Matter of Warren*, 105 App. Div. 582, 94 N. Y. Supp. 286.

Right to enforce judgment by execution does not conflict with section 212 Sur. Ct. A., establishing priority of payment. *Mount v. Mitchell*, 31 N. Y. 356.

Member of firm died and by his will directed his executor to

continue his interest in the business — *held*, that the executor became copartner with the surviving partner, and that debts so contracted were primarily liens on the partnership funds, and that execution need not be issued under sections 1126 Civ. Prac. A. and 151, 152 Dec. Est. Law. *Columbus W. Co. v. Holdenpyl*, 135 N. Y. 430; *aff'g*, 61 Hun, 567, 41 N. Y. St. Repr. 393, 16 N. Y. Supp. 337.

What must be shown.

The applicant must show either that the representative has funds of the estate on hand applicable to the payment of the judgment which he refuses to apply, or that funds of the estate have been misapplied which should have been devoted to the payment of the judgment. *Matter of Warren*, 105 App. Div. 582; *Matter of Gall*, 40 App. Div. 114, 57 N. Y. Supp. 835.

An intermediate accounting may be ordered.

Often it is desirable to have an intermediate accounting in order to determine the right to the execution.

It is provided in section 253 that an intermediate accounting may be ordered at any time. Section 254 provides in such a case, as for instance an application for leave to issue an execution, that any party may contest such an account as to any matter affecting his interest, and the decree or order may go only to the extent of determining the questions necessary to be determined on such application. *In re Lansing*, 189 App. Div. 657, 179 N. Y. Supp. 48.

Security may be required.

Where a judgment has been rendered against an executor or administrator, for a legacy or distributive share, the surrogate, before granting an order permitting an execution to be issued thereupon, may, and in a proper case, must, require the applicant to file in his office, an undertaking to the defendant, in such a sum, and with such sureties, as the surrogate directs, to the effect, that if, after collection of any sum of money by virtue of the execution, the remaining assets are not sufficient to pay all sums, for which the defendant is chargeable, for expenses, claims entitled to priority as against the applicant, and the other legacies or distributive shares of the class to which the applicant's claim belongs, the plaintiff will refund to the defendant, the sum, so collected, or such ratable

part thereof, with the other legatees or representatives of the same class, as is necessary to make up the deficiency. § 153, *Dec. Est. L.*

Order evidence of assets.

An order permitting a judgment creditor to issue an execution against an executor, administrator, guardian or testamentary trustee is, except upon appeal therefrom, conclusive evidence that there are sufficient assets in his hands to satisfy the sum for which hte order permits the execution to issue.

From § 79, *Sur. Ct. A.*

The moving papers should show the amount of all claims against the estate so that the surrogate can determine the amount for which he will allow execution to be issued. *Sippel v. Macklin*, 2 Dem. 219.

Damages for negligently causing death. See ¶¶ 86, 417.

Where an attorney recovered judgment against the representative for his services, it was held that he must obtain leave to issue execution. *Sartorelli v. Ezagni*, 64 Misc. Rep. 115, 118 N. Y. Supp. 46.

Damages recovered for death are now assets for the payment of funeral expenses, and an execution may issue against the representative upon a judgment recovered therefor. *Matter of McDermott*, 49 Misc. Rep. 402, 99 N. Y. Supp. 829.

Contents of execution against property.

An execution against real or personal property, in the hands of an executor, administrator, heir, devisee, legatee, tenant of real property, or trustee, must substantially require the sheriff to satisfy the judgment out of that property.

§ 646, *Civ. Prac. A.* Former § 1371, *Code Civ. Pro.*

An execution to be satisfied out of the property of the estate can only be issued by express order and after notice under sections 151, 152, *Dec. Est. L.*, and such execution would have to be in the form prescribed by section 646, *Civ. Prac. A.* *Matter of Quackenbos*, 38 Misc. Rep. 66, 76 N. Y. Supp. 964.

Notice of motion to set aside.

Notice of motion to set aside an order for issue of execution may be served upon the attorney who obtained the order.

Judgment creditor a nonresident. *Matter of McCunn*, 4 Redf. 15.

Proceedings to obtain leave to issue execution against representative of a deceased executor or administrator.

Where the representative of a deceased executor has accounted and been charged in a decree with an amount found to be due from the original executor, such decree is not conclusive evidence of the existence of assets (§ 79 Sur. Ct. A.) and execution thereon can only be issued by leave of surrogate. Upon such application it is competent to inquire as to what assets, if any, the representative holds, and how far there are other creditors who are entitled to participate in the assets. *Matter of Seaman*, 63 App. Div. 49, 71 N. Y. Supp. 376.

Where the moving papers do not show existence of assets, an accounting should be ordered before granting leave to issue execution. *Peters v. Carr*, 2 Dem. 22.

The order that execution issue is conclusive evidence that there are sufficient assets in the hands of the representative. Section 79 Sur. Ct. A. *Matter of Weil*, 110 App. Div. 67, 96 N. Y. Supp. 1017.

Where execution has been issued and an accounting had, the surrogate may make an order requiring payment of the amount found to be applicable to the payment of a judgment of the Supreme Court. *Matter of Mahoney*, 88 App. Div. 140, 84 N. Y. Supp. 329.

Execution may be issued in favor of a representative who has succeeded to the office of the plaintiff.

An execution may be issued, in the name of an executor or administrator, in his representative capacity, upon a judgment recovered by any person who preceded him in the administration of the same estate, in any case where it might have been issued in favor of the original plaintiff, and without a substitution.

§ 154, *Dec. Est. L.*

Execution where costs are awarded against the representative personally.

* * * So much of the judgment as awards a sum of money against him personally may be separately docketed and a separate execution may be issued thereupon as if the judgment contained no award against him in his representative capacity.

From § 142, Dec. Est. L. Part of former § 1816, Code Civ. Pro.

Execution may be issued against all the representatives, even though all have not appeared.

Where all the representatives have not been summoned or have not appeared, execution may be issued against all.

From § 143, Dec. Est. L. Part of former § 1817, Code Civ. Pro.

This section does not change the rule that in an action for or against executors all the qualified and acting executors must be made parties. *Simpson v. Simpson*, 44 App. Div. 492, 60 N. Y. Supp. 879.

A claim for costs against an administrator obtained in an action brought by him in which he was defeated may be enforced by execution. *Matter of Mahoney*, 37 Misc. Rep. 472, 75 N. Y. Supp. 1056.

Execution after death of judgment creditor.

Where the party recovering a final judgment has died, execution may be issued at any time, within five years after the entry of the judgment, by his personal representatives, or by the assignee of the judgment, if it has been assigned, and the execution must be indorsed with the name and residence of the person issuing the same. And where a party or one or more of several parties against whom a judgment for the recovery of possession of real property has been obtained, has died, an order granting leave to issue and execute such execution or writ of possession may be granted upon giving twenty days' notice to the occupants of the lands so recovered and to the grantees or devisees of said deceased, or, if he died intestate, to the heirs-at-law of said deceased, said notices to be served in the same manner as a summons is directed to be served in an action in the supreme court.

§ 651, *Civ. Prac. A.*

A firm composed of two partners obtained a judgment and one party died — *held*, that the representative of the deceased

party could join with the surviving partner in an application to issue execution. *Matter of Armstrong*, 35 Misc. Rep. 327, 71 N. Y. Supp. 951.

Upon application for leave to issue an execution obtained against partners, one of such persons cannot show that no summons was ever served upon him. *Matter of Armstrong*, 35 Misc. Rep. 327, 71 N. Y. Supp. 951.

Issued after five years.

Sections 650, 651, 652 Civ. Pr. A. must be read together and the true construction to be given to the sections read together is that within five years after the entry of the judgment an execution may be issued of course by whoever is then the owner of the judgment and entitled to collect it, whether the original judgment creditor or his assignee, or his personal representatives; that if such an execution has been issued within five years and returned unsatisfied a second execution may thereafter be issued without the necessity of a permissive order by whoever may then be the owner of the judgment and entitled to collect it, whether the original judgment creditor or his assignee or his personal representatives. *Guiterman v. Coutant*, 128 App. Div. 452, 112 N. Y. Supp. 900.

Contents of such execution.

It should recite the recovery of the judgment and the issue of an execution thereon, and its return unsatisfied, and the death of the plaintiff and judgment creditor, and the issue of letters testamentary to his executors, and direct the sheriff to satisfy said judgment out of the property of the judgment debtor.

Leave required to issue execution against decedent's property.

No execution against decedent, except by leave of court.

An execution to collect a sum of money cannot be issued, against the property of a judgment debtor, who has died since the entry of the judgment, except as prescribed in the next two sections.

Former § 1379, *Code Civ. Pro.* § 654, *Civ. Prac. A.*

Execution against decedent's property.

1. After the expiration of one year from the death of a party, against whom a final judgment for a sum of money, or directing the payment of a sum of money is rendered, the judgment may be enforced by execution against any property upon which it is a lien with like effect as if the judgment debtor was still living.

2. But such an execution shall not be issued, however, unless an order granting leave to issue it is procured from the court from which the execution is to be issued, and from a surrogate's court of this state, which has duly granted letters testamentary or letters of administration upon the estate of the deceased judgment debtor.

3. Where the lien of the judgment was created as prescribed in sections 510 and 511 of this act, neither order can be made until the expiration of eighteen months after letters testamentary or letters of administration have been duly granted upon the estate of the decedent, and for that purpose such a lien existing at the decedent's death continues for two years thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment roll.

4. Where letters upon the estate of the decedent have not been granted within eighteen months after his death by the surrogate's court of the county in which the decedent resided at the time of his death, or if the decedent resided out of the state at the time of his death, and letters testamentary or letters of administration have not been granted within the same time by the surrogate's court of the county in which the property on which the judgment is a lien is situated, such court may grant the order where it appears that the decedent did not leave any personal property within the state upon which to administer. In such case the lien of the judgment existing at the decedent's death continues for two years as aforesaid.

5. Such judgment lien, existing at the decedent's death, upon the decedent's real property, or some portion thereof, may be enforced and payment thereof obtained during the said eighteen months after granting of letters testamentary, or letters of administration, in the manner prescribed by the Surrogate's Court Act for the disposition of decedent's real property for the payment of debts.

6. This section shall not apply to real estate which shall have been conveyed, or hereafter may be conveyed by the deceased judgment debtor during his lifetime, if such conveyance was made in fraud of his creditors or any of them, and any judgment creditor of said deceased, against whose judgment said conveyance shall have been, or may hereafter be, declared fraudulent by the judgment and decree of any court of competent jurisdiction, may enforce his said judgment against such real property, with like effect as if the judgment debtor was living, and it shall not be necessary to obtain the leave of any court or officer to issue such execution, and the same may be issued at any time to the sheriff of the county where such property is or may be situated. The person issuing such execution, however, shall annex thereto a description of the real estate against which the same is sought to be enforced, as aforesaid, and shall endorse on said execution the words "issued under section 655 of the Civil Practice Act," whereupon said sheriff shall enforce said execution, as therein directed, against the property so described, and not against any other property, either real or personal,

and all provisions of law relating to the sale and conveyance of real estate on execution and the redemption thereof shall apply thereto.

§655, *Civ. Prac. A.* Former § 1380, *Code Civ. Pro.*

Leave, how obtained.

Leave to issue an execution as prescribed in the last section, must be procured as follows:

1. Notice of the application to the court from which the execution is to be issued, for an order granting leave to issue the execution, must be given to the person or persons whose interest in the property will be affected by a sale by virtue of the execution, and also to the executor or administrator of the judgment debtor. The rules may prescribe the manner in which the notice must be given; until provision is so made, it must be served either personally or in such manner as the court prescribes in an order to show cause. Leave shall not be granted, except upon proof by affidavit, to the satisfaction of the court, that the judgment remains wholly or partly unsatisfied.

2. For the purpose of procuring a decree from the surrogate's court granting leave to issue the execution, the judgment creditor must present to that court a written petition, duly verified, setting forth the facts, and praying for such a decree; and that the persons specified in the first subdivision of this section, may be cited to show cause why it should not be granted. Upon the presentation of such a petition the surrogate must issue a citation accordingly, which citation may be served in the same manner as is provided in the first subdivision of this section for the service or giving of a notice to the parties or persons therein mentioned, and, if the rules do not provide for a mode of giving such notice, such citation must be served in such manner as the surrogate by order may prescribe, or as is otherwise provided by law; and, upon the return thereof, he must make such a decree in the premises as justice requires.

§ 656, *Code Civ. Pro.* Former § 1381, *Code Civ. Pro.*

This application is an original special proceeding in which in case of contest costs may be awarded under section 278 Sur. Ct. A. *Gillies v. Kreuder*, 1 Dem. 349.

Leave to issue execution should only be granted upon notice to the persons interested. *First Nat. Bank of Utica v. Ballou*, 49 N. Y. 155.

The surrogate has no power to hear evidence on an allegation that the judgment was fraudulently obtained. *Freeman v. Nelson*, 4 Redf. 374.

The surrogate has power to determine what, if any, payments have been made on the judgment to ascertain the sufficiency of the assets to pay debts of like character, but not to ascertain if the judgment is valid. *Freeman v. Nelson*, 4 Redf. 374, 375.

When execution may be issued after five years.

After the lapse of five years from the entry of a final judgment, execution can be issued thereupon, in one of the following cases only:

1. Where an execution was issued thereupon within five years after the entry of the judgment, and has been returned wholly or partly unsatisfied or unexecuted.
2. Where an order is made by the court, granting leave to issue the execution.

§ 652, *Civ. Prac. A.* Former § 1377, *Code Civ. Pro.*

Issuing execution; leave, how obtained.

Notice of an application for an order granting leave to issue an execution, as prescribed in the last section, must be served personally upon the adverse party, if he is a resident of the state, and personal service can be made upon him therein with reasonable diligence; otherwise, notice must be given in such manner as the court directs. Where the judgment is for a sum of money, or directs the payment of a sum of money, leave shall not be granted, except on proof, by affidavit, to the satisfaction of the court, that the judgment remains wholly or partly unsatisfied

§ 625, *Civ. Prac. A.* Former § 1378, *Code Civ. Pro.*

The mode of procedure to issue an execution upon a surrogate's decree which has been docketed in the county clerk's office is the same as upon a judgment, and this section applies. The time of five years must be computed from the date of entry of the decree in the surrogate's office. *People v. Woodbury*, 70 App. Div. 416.

Sections 652 and 653, Civil Practice Act, apply to decrees of Surrogate's Court. *People ex rel. Sackett v. Woodbury*, 70 App. Div. 416, 75 N. Y. Supp. 236.

Execution against surviving judgment debtors.

The last six sections do not affect the right of a judgment creditor to enforce a judgment, against the property of one or more surviving judgment debtors, as if all the judgment debtors were living. In that case, an execution must be issued in the usual form; but the attorney for the judgment creditor must indorse thereupon, a notice to the sheriff, reciting the death of the deceased judgment debtor, and requiring the sheriff not to collect the execution, out of any property which belonged to him.

§ 658, *Civ. Prac. A.* Former § 1383, *Code Civ. Pro.*

CHAPTER X.

The Different Classes of Wills and How They Should be Executed.

¶ 36. Classes of wills and who may make them.

¶ 37. How a will must be executed.

¶ 38. Execution of holographic, nuncupative, duplicate and mutual wills.

¶ 36 Classes of Wills Mentioned and Defined: Who May Make Them.

Last will and testament.

The Century Dictionary defines a will to be “the legal declaration of a person’s intentions to take effect after his death. The essential distinction between a will and any other instrument or provision contingent upon death is that a will has no effect whatever until death and may be freely revoked meanwhile; but a deed which may create or convey an estate in event of death must take effect as binding the grantor in his lifetime.”

“In English law the word ‘will’ was originally used only of a disposition of real property to take effect at death, the word ‘testament’ being then used as in the Roman and civil law of a disposition of personal property; hence the phrase, now redundant, ‘last will and testament.’ In modern usage the term ‘will’ does not necessarily imply an actual disposition of property; for an instrument, executed with the formalities required by law, in which the testator merely appoints a guardian for his child, or merely nominates an executor, leaving the assets to be distributed by the executor among those who would take by law, is a will.”

A will has been defined to be a “declaration of the mind either by word or writing in disposing of an estate and to take place after the death of the testator. It is in Latin called *testamentum*, i. e., *testatio mentis*, the witness of a man’s mind, and to devise by testament is to speak by a man’s will

what his mind is to have done after his death." *Hubbard v. Hubbard*, 12 Barb. 148; aff'd, 8 N. Y. 196.

The law in its liberality does not require that a will should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however inartificial, discloses the intention of the maker respecting the posthumous destination of his property. If the will does not respond to this single requirement it may be void for uncertainty. But no degree of technical informality, no confusion in the collocation of words, no grammatical or orthographical errors deter the judicial expositor from entering on the duty of eliciting from the contents of the instrument the intention of its author. *Kalish v. Kalish*, 166 N. Y. 368; *Matter of Hansen*, 72 Misc. Rep. 610; 132 N. Y. Supp. 257.

A paper duly executed directed how the estate should be disposed of, but stated an intention to make a formal will — held, that the paper was entitled to probate as a will. *Matter of Beebe*, 6 Dem. 43, 19 N. Y. St. Repr. 833.

Whether a paper is a will or not in its character does not depend upon the maker declaring it to be a will at the time he executes it. Its validity under the statute depends upon that, but the nature of the instrument depends upon its contents. *Carle v. Underhill*, 3 Bradf. 101.

It is not necessary that a will shall contain a statement that it is a will. *Matter of Buchan*, 16 Misc. Rep. 204, 38 N. Y. Supp. 1124.

A paper executed as a will stated that it incorporated copies of an earlier will and codicils, which had not been revoked but which had been lost, and republished them. It was held that the paper was a will. *Matter of Bearns*, 89 Misc. Rep. 712.

Will the only instrument by which certain kinds of future transfers may be made.

Often attempts are made to effect a future transfer of property by some other instrument than by a will, with the result that said transfer is void as being of a testamentary character.

One of the essential features of a will is that it does not operate until death of the testator. A transfer by deed or trust so drawn that the maker reserves the subject of the transfer and does not part with title or control, is testamentary in character and is void unless the paper is executed as the law requires a will to be executed. *Butler v. Sherwood*, — App. Div. —, 188 N. Y. Supp. 242.

“Wills” to include codicils.

The term “will,” as used in this chapter, shall include all codicils as well as wills. § 2, *Decedent Estate Law*.

The word “will” signifies a last will and testament, and includes all the codicils to a will.

From § 314, Sur. Ct. A., subd. 4. Formerly § 2768, Code Civ. Pro.

Codicil may be proved as will.

A will may be revoked, and a codicil may under some circumstances be proved and stand as a will where it is independent of the will in its provisions. *Matter of Francis*, 73 Misc. Rep. 148, 132 N. Y. Supp. 695.

Conditional and contingent will.

A will may be so drawn that it will not become operative except under certain conditions or contingencies, such as death on a certain voyage. If death does not come on that particular voyage, it may not be valid as a will upon the testator's subsequent death. *In re Bittner*, 104 Misc. Rep. 112, 171 N. Y. Supp. 366.

Holographic will. See ¶ 38.

A holographic will is one wholly written by the testator, excepting the signatures of the witnesses. Its effect and manner of proof is the same as that of other wills.

Nuncupative or unwritten wills, when allowed. See ¶ 38.

No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service or by a mariner, while at sea. § 16, *Decedent Estate Law*.

The execution and tenor of a nuncupative will must be proved by two witnesses. § 141 Sur. Ct. A.

A nuncupative will is made by the verbal declaration of the testator, and usually depends merely on oral testimony for proof. Nuncupative wills are now sanctioned when made by soldiers in actual military service or mariners or seamen at sea.—*Century Dictionary*.

Who may make a will.

The right given to make a will is statutory. Sections 10 and 15, Decedent Estate Law. Property and its disposition is not a natural right, but the creature of civil society, and subject in all respects to the disposition and control of civil institutions. The ownership and control of property is the offspring of the social state, not the incident of the state of nature.

Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate by will in writing.

§ 15, *Decedent Estate Law*.

Who may make a will of real estate.

All persons except idiots, persons of unsound mind and infants, may devise their real estate by a last will and testament, duly executed, according to the provisions of this article.

§ 10, *Decedent Estate Law*.

A minor more than eighteen years of age may make a valid disposition of his personal property by will. Laws of 1867, chap. 782. *Matter of Bolton*, 159 N. Y. 129; aff'g, 37 App. Div. 625. *Horton v. McCoy*, 47 N. Y. 21.

Aliens.

While sections 10 and 15 of the Decedent Estate Law do not in terms include or exclude alien residents, it now seems to be considered that alien residents may make wills of personal and real estate in the same manner and to the same effect as citizens of this country, subject, however, to the restrictions of any treaty. *Howard v. Moot*, 64 N. Y. 262; *Haley v. Sheridan*, 190 N. Y. 331.

¶ 37 How a Will Must be Executed.

Requirements for a valid execution of a will.

Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.
2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses.
3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament.
4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.

§ 21, *Decedent Estate Law*.

Seal not necessary.

A seal is not necessary to a will of real or personal estate. *Matter of Diez*, 50 N. Y. 88; *Boon v. Castle*, 61 Misc. Rep. 474.

Where a will recites the affixing of a seal, but none appears, that fact alone is not sufficient to lead the court to say that the testamentary act was uncompleted. *Matter of McCarthy*, 59 Misc. Rep. 128, 112 N. Y. Supp. 219.

Executed on Sunday.

A will may be executed on Sunday or other legal holiday. A law which prohibited the execution of a will on such days might deprive some persons of the right to make a will at all. *In re Margraf*, 106 Misc. Rep. 311, 174 N. Y. Supp. 425.

A will was not held invalid because executed on Sunday but dated back to the day before. *Children's Aid S. v. Loveridge*, 70 N. Y. 387.

Must be subscribed by testator.

The will must be subscribed by the testator. Any form or style of signature which is shown to have been adopted by the testator as his signature is sufficient.

One who is unable to sign his name may call upon another for aid, even to the extent of holding his hand and guiding it. *Robins v. Coryell*, 27 Barb. 556; *Matter of Kearney*, 69 App. Div. 481, 74 N. Y. Supp. 1045.

But in some way the act of subscription must be the act of the intending testator and not of another. *Matter of Mooney*, 73 Misc. Rep. 315, 324, 132 N. Y. Supp. 705.

Section 22 of the Decedent Estate Law by implication allows another to sign the testator's name at his request and in his presence. See *post*.

Subscription may be by mark. See ¶ 61.

Where the subscription is by mark, it is the mark which is the signature and not the name written around it.

Where a person is illiterate he must subscribe the will by making some mark or symbol for his signature, or authorize some person to sign his name for him. *Matter of Benevenuto*, 38 Misc. Rep. 272, 77 N. Y. Supp. 651.

It is the "mark" and not the written name which is the subscription to a will by a marksman, and the writing of the name around the mark is no essential part of the evidence. *Jackson v. Jackson*, 39 N. Y. 153.

Where the signature is imperfect, it may be considered as a "mark." *Hartwell v. McMaster*, 4 Redf. 389; foll'g, 5 Dem. 285.

The signature of testator was by mark not made in the presence of the witnesses or acknowledged to them. The witness to the mark was dead and there was no proof that the testatrix signed the will at all. Probate denied. *Matter of Van Gieson*, 47 Hun, 5, 14 N. Y. St. Repr. 117.

Proof where signature is by mark.

Where a testator can read and write and then signs by mark, clear and satisfactory evidence must be produced by the proponent which explains the resort to a mark. *Matter of Irving*, 153 App. Div. 728, 138 N. Y. Supp. 784; aff'd, 207 N. Y. 265.

Must be subscribed at the end.

The reason for requiring the signature of the testator to be at the end of the will is for the purpose of avoiding additions

to the will after its execution, and to show a completed act of the testator embracing all the provisions he desires to incorporate in his will. *Matter of DeHart*, 67 Misc. Rep. 13.

By annexing slips or sheets of paper, if referred to in the will, the signing may be at the end. *Matter of Field*, 204 N. Y. 448; rev'g, 144 App. Div. 737, 129 N. Y. Supp. 590.

Both testator and witnesses must sign at the end. *Matter of Nies*, 13 N. Y. St. Repr. 756; *Dennett v. Taylor*, 5 Redf. 561; distinguished in 13 N. Y. St. Repr. 157.

Will written upon printed form of one page and signed at the end thereof. Subdivisions marked first and second fill the entire blank space, and at the end thereof the words " See annexed sheet " are inserted. On a separate slip of paper are written additional subdivisions marked " Third " and " Fourth," and this is attached to the face of the will immediately over the first and second subdivisions by metal staples along the top. *Held*, not a valid subscription at the end of the will. *Matter of Whitney*, 153 N. Y. 259, 4 Ann. Cas. 259, revg. 90 Hun, 138, 70 N. Y. St. Repr. 259, 35 N. Y. Supp. 798.

Where the name of testator is written in the body of the instrument without any material portion following the signature, it is not properly subscribed at the end. *Sisters of Charity v. Kelly*, 67 N. Y. 409.

Where a one sheet form was used and above the place on the form for the signature was the word " over " and the sentence begun on the first page was continued and completed on the back of the first page, it was held that the will was signed at the end, although the signatures were all on the first page. *In re Rowe*, 159 N. Y. Supp. 615.

Signed in or at end of attestation clause.

Where the name of testator was written by him in the attestation clause, but not as his signature, and the witness did not see the real signature to the will — *held* not to have been properly executed. *Matter of Keffe*, 155 App. Div. 576, 141 N. Y. Supp. 5; aff'd, 209 N. Y. 535.

By subscribing after the attestation clause, the testator

makes that clause a part of his will and the will is signed at the end. *Younger v. Duffie*, 94 N. Y. 535, aff'g. 28 Hun, 242.

Will signed in the body of the attestation clause — *held*, signed at the end. *Matter of Acker*, 5 Dem. 19; *Matter of De Hart*, 67 Misc. Rep. 13.

Whether the testator's name written in the attestation clause by testator is a subscription to the will, depends upon whether there is evidence that it was so written by him as his subscription and that fact made known to the witnesses. *In re Rudolph*, 180 App. Div. 486, 167 N. Y. Supp. 760, revg., 97 Misc. Rep. 548, 163 N. Y. Supp. 411.

Not a subscription at the end of the will, where signature was on third page and a part of the written will was carried over to the fourth page. *Matter of O'Neil*, 91 N. Y. 516; aff'd, 27 Hun, 130, distinguishing *Tonnele v. Hall*, 4 N. Y. 140.

Printed blank of one page — part of the will written upon the back of the form — signed on the face by testator and witness — *held* not signed at the end. *Matter of Conway*, 124 N. Y. 455, revg. 58 Hun, 16, distinguishing *Van Cortlandt v. Kip*, 1 Hill, 590; *Brown v. Clark*, 77 N. Y. 369; *In re Wash. Park*, 52 N. Y. 131; *Tonnele v. Hall*, 4 N. Y. 140; *Crossman v. Crossman*, 95 N. Y. 145.

First page carried to third page and then back to second page, where the signatures were placed — *held* not signed at the end. *Matter of Andrews*, 162 N. Y. 1, aff'g. 43 App. Div. 394, 60 N. Y. Supp. 141.

Where a blank page intervenes. *Matter of Peiser*, 79 Misc. Rep. 668; 140 N. Y. Supp. 844.

The rule since *Matter of Field*, 204 N. Y. 448, is to be construed more liberally concerning signing at the end.

Subscription must be made in the presence of the witness or it must be acknowledged to them.

The testator must subscribe his name in the presence of the witnesses, or he must acknowledge his signature to each of them, but such acknowledgment may be to each witness separately. Both of the witnesses must see the act of signing or

must see the signature. A blind person is not competent to act as a witness.

A person who cannot see well enough to identify a signature on a paper by sight cannot be a witness to a will. *Matter of Losee*, 13 Misc. Rep. 298, 69 N. Y. St. Repr. 188, 34 N. Y. Supp. 1120.

Testator said to the witnesses: "That is my will; I want you to witness it." The witnesses thereupon signed the attestation clause. The deceased then took the paper and said: "I declare this to be my last will and testament." Her name was signed to the paper. Probate was denied as there was no proof of signing or acknowledgment. *Mitchell v. Mitchell*, 16 Hun, 97; aff'd, 77 N. Y. 596.

Where from the whole evidence the surrogate is satisfied that the testator had signed the will before the witnesses signed it, and that his name was visible on it, and that testator declared it to be his will, and asked the witness to sign it, probate must be granted. *Robinson v. Smith*, 13 Abb. Pr. 359.

Where the witness signed directly under the signature of testator and there was no fold in the paper, it was held that he must have seen the signature of the testator, and that a decree denying probate should be reversed. *Matter of McDougall*, 87 Hun, 349, 68 N. Y. St. Repr. 426, 34 N. Y. Supp. 302.

A signature neither seen, identified, nor in any manner referred to as a separate and distinct thing cannot in any just sense be said to be acknowledged by a reference to the entire will by name to which the signature may or may not be at the time subscribed. *Lewis v. Lewis*, 11 N. Y. 220; *Matter of De Haas*, 9 App. Div. 561, 75 N. Y. St. Repr. 1085, 41 N. Y. Supp. 701.

Will signed in presence of one witness after both witnesses had signed, no acknowledgment. Probate denied. *Matter of Purdy*, 46 App. Div. 33, 61 N. Y. Supp. 430; aff'g, 25 Misc. Rep. 458, 55 N. Y. Supp. 644.

No positive evidence of signing, acknowledging, or declaring, but a complete attestation clause — held not properly executed. *Woolley v. Woolley*, 95 N. Y. 231.

Where the name of testator was written by him in the attestation clause, but not as his signature, and the witness did not see the real signature to the will — *held* not to have been properly executed. *Matter of Keeffe*, 155 App. Div. 576, 141 N. Y. Supp. 5; *aff'd*, 209 N. Y. 535.

When the will is not signed in the presence of the witnesses.

The decisions are explicit to the effect that, where the testator does not sign the will in the presence of the witnesses, it is necessary, in addition to the declaration that the document is his last will, there be a further declaration that he has signed it and that, if signed by mark, that the mark appearing thereon is his signature.

While the courts construe the statutes liberally so that their objects shall not be defeated and, consequently, hold that any act substantially complying with the statutes is sufficient, yet they have never held that an absolute noncompliance with any essential provision of the law can be overlooked. This strictness of the decisions is evidenced in the *Matter of Whitney* (150 N. Y. 259) and *Matter of Andrews* (162 *id.* 1), in each of which the Court of Appeals held that the wills offered for probate were invalid because they had not been signed at the end.

Acknowledgment of signature.

An acknowledgment by the testator of his signature and of the execution of the will is equivalent to the actual seeing by the witnesses of the physical act of subscription. *Hoysradt v. Kingman*, 22 N. Y. 372.

When a testator produces a paper to which he has personally affixed his signature, requests the witnesses to attest it, and declares it to be his last will and testament, he does all that the law requires. *Baskin v. Baskin*, 36 N. Y. 416.

The discussion as to subscribing or acknowledging a will in *Willis v. Mott* was treated as *dictum* in *In re Mackay*, 110 N. Y. 611, and was not followed.

In the absence of a subscription of the will in the presence

of the witnesses, there must be an acknowledgment of the signature. *Sisters of Charity v. Kelly*, 67 N. Y. 409, revg. 7 Hun, 290.

A will should not be refused probate because the attesting witnesses did not look closely to see the testator's signature acknowledged by her, where it was visible and they heard her acknowledgment, and her declaration that the instrument was her last will, and there is no claim of fraud. *Matter of Laudy*, 161 N. Y. 429, revg. 31 App. Div. 630.

Testator acknowledged his signature to one witness and declared the paper to be his will, and requested him to sign as a witness; subsequently he requested the other witness to sign as a witness, without, as that witness swore, either acknowledging his signature or declaring the paper to be his will. There were facts tending to cast suspicion upon the testimony of the second witness. *Held* valid execution. *Matter of Bogert*, 2 Dem. 117.

Where the witnesses see the testator with his hand on the pen and hear the sound of writing, it is sufficient. *Matter of Van Houten*, 15 Misc. Rep. 176, 72 N. Y. St. Repr. 143, 37 N. Y. Supp. 39.

Subscribing witness should either see the testator subscribe the will, or, with the signature visible to them, he should acknowledge it. *Matter of Laudy*, 148 N. Y. 403, modifying 78 Hun, 479.

Where testator handed the will to the witnesses so folded that they could not see his signature, *held*, that proof of due execution was not sufficient. *Matter of Mackay*, 110 N. Y. 611; *Matter of Laudy*, 14 App. Div. 160, 43 N. Y. Supp. 689, 77 N. Y. St. Repr. 689; *Matter of Abercrombie*, 24 App. Div. 407, 48 N. Y. Supp. 414, 82 N. Y. St. Repr. 414; distinguished in 24 App. Div. 540, 49 N. Y. Supp. 32, 38.

Our statute does not require that the acknowledgment of the testator or his declaration shall be made to both witnesses at the same time, or that they shall sign in the presence of each other. *Matter of Diefenthaler*, 39 Misc. Rep. 765; *Hoysradt v. Kingman*, 22 N. Y. 372; *Willis v. Mott*, 36 N. Y. 486; *Barry v.*

Brown, 2 Dem. 309; *Lyman v. Phillips*, 3 Dem. 459; aff'd, 34 Hun, 627, 98 N. Y. 267; *Matter of Carey*, 14 Misc. Rep. 486, 71 N. Y. St. Repr. 593, 36 N. Y. Supp. 817; aff'd, 24 App. Div. 531, 49 N. Y. Supp. 32.

Where the alleged will was not subscribed by the testator in the presence of the witnesses, and when they signed their names it was so folded that they could not see whether it was subscribed by him or not, and the only acknowledgment or declaration made by him to them or in their presence was "I declare the within to be my will and deed" — *held* not sufficient. *Lewis v. Lewis*, 11 N. Y. 220.

Where a testator had signed a codicil to his will, and taking it to a person asked him to witness an alteration in his will, and such person then asked testator "if he acknowledged that to be his work" — *held* acknowledgment to be insufficient. *Matter of Ballard*, 1 Dem. 496.

Publication of a will.

The publication of the will by the proposed testator is one of the four indispensable requirements to its validity. It is important, first, in denoting that the testator knows the nature of the instrument he is executing and to check any deception upon him. In the second place, and also in order that there may be no imposition perpetrated, it is important that the subscribing witnesses understand that they are attesting the signature to the will of the person at whose request they severally subscribe their names. They realize, if the document is a will, that they are expected to remember what occurred at its execution and be ready to vouch for its validity in court. The declaration of the testator that the instrument is his will is not solely, therefore, for the purpose of showing that he knew he was executing his will. His subsequent declaration that he executed the instrument propounded would not relieve the proponents of the necessity of proving what occurred at the time of the execution. The statute is explicit in this requirement, and, while the reason for it may be to insure certainty that the person executing the alleged will knows what the

paper is, yet to effectuate this purpose the witnesses selected must be apprised by the testator that they are to witness his will. *Matter of Moore*, 109 App. Div. 762, 96 N. Y. Supp. 729, 17 Ann. Cas. 380; aff'd, 187 N. Y. 573.

The publication of a will may be made in any form of communication by the testator to the witnesses, whereby he makes known to them that he intends the instrument to take effect as his will. *Coffin v. Coffin*, 23 N. Y. 9.

A statement that the paper is a "document" or "instrument" is insufficient. *Matter of Turell*, 28 Misc. Rep. 106; aff'd, 47 App. Div. 560, 62 N. Y. Supp. 1053; aff'd, 166 N. Y. 330; *Matter of Delprat*, 27 Misc. Rep. 355, 58 N. Y. Supp. 768.

Case holding that there was no proper declaration to or request of both witnesses. *Matter of Burke*, 1 Dem. 436.

It is not sufficient if the witness to a will knew it was testator's will from another source than his own statement or acts equivalent to such statement. *Gilbert v. Knox*, 52 N. Y. 125.

The publication of a will may be made to the subscribing witnesses on different occasions and when they are apart from each other. *Matter of Barry*, 2 Dem. 309.

Evidence of prior communications to the subscribing witnesses cannot be invoked to eke out the circumstances immediately attending the execution, where the latter do not include substantially such a declaration. *Walsh v. Laffan*, 2 Dem. 498, distinguished in 20 N. Y. Supp. 123.

Publication with reference to time of signing by testator.

It is well settled that the time when the testator declares the document to be his will in relation to the time when he signs the same is of no importance. He may declare the will just before signing it, or while he is signing it, or immediately after he signs it, if as a matter of fact he signs it, and the signing and declaration are all a part of one testamentary act, and are consummated at one time. *Doe v. Doe*, 2 Barb. 200; *Lewis v. Lewis*, 13 Barb. 17; *Keeney v. Whitmarsh*, 16 Barb. 141; *Jackson v. Jackson*, 39 N. Y. 153.

Where after a witness had begun to write his name he was informed by testator that the paper was his will — *held* sufficient. *Matter of Phillips*, 98 N. Y. 267.

Where the second witness to whom the paper was not acknowledged, remained with the testator some time and then went to lunch with him where testator told him the paper was his will, it was held sufficient declaration. *Matter of Baldwin*, 67 Misc. Rep. 329, 124 N. Y. Supp. 612; *aff'd*, 142 App. Div. 904, 126 N. Y. Supp. 1121; *aff'd*, 202 N. Y. 548.

Adopting the words and acts of a spokesman.

In the case of *Heath v. Cole* (15 Hun, 100), the court says, at page 103:

“ The knowledge that the instrument which the witnesses are called upon to attest is a will must be communicated to them by the testator at the time of his subscription. It is apparent that, in considering the question whether that was done in the present case, we must bear in mind the testator’s condition.

“ When a man is in full health and strength, with all his senses in vigor, whatever is said for him in his presence may, properly and without danger, be taken to be his act. The declaration that the instrument is the testator’s will, and the request to the witnesses to sign may be made by another under such circumstances that they are plainly adopted by the testator and become his acts. But, when a man is feeble, and able to speak but faintly, at the very last of a sickness which has lasted for eleven years, and within a few hours of his death, then it is necessary to examine more carefully what takes place before him. It will not answer then to assume, without some clear proof, that he adopts the acts of those about him, who pretend to speak for him. In his feeble condition he may be unable to express his dissent and it is unsafe to take his silence as acquiescence.”

If the many acts involved in the execution are performed in the presence of a competent and intelligent testator, with his

acquiescence, a general authority on his part given to execute the same is sufficient.

But where the deceased by old age and disease is on the verge of the grave, incapable of raising his voice sufficiently to be heard either in affirmation or protest concerning what is being done, then the mere fact that the will is signed in his presence, without his active dissent, is not to be regarded as all that is necessary to establish its proper execution. *Matter of Rogers*, 52 Misc. Rep. 412, 103 N. Y. Supp. 423.

It was held in *Matter of Nelson* (141 N. Y. 152; aff'g, 21 N. Y. Supp. 1123), that a request to sign as a witness, made by the person superintending the execution of a will in the hearing of the testator and with his silent permission and approval, is a sufficient compliance with the requirements of the statute. *Gilbert v. Knox*, 52 N. Y. 125, 128; *Peck v. Cary*, 27 id. 9.

“The fact that the instrument in question was the will of the testator was made known to the witnesses by the declaration of Evarts, who acted and spoke for the testator, not only in preparing the will, but in seeing that it was properly executed. We are of the opinion that the testimony of Evarts as to what was said and done at the time the will was executed was competent.” *Matter of Barnes*, 70 App. Div. 523, 75 N. Y. Supp. 373.

The act of the attorney in asking the testator if he acknowledges the instrument to be his last will and testament, and if he desires the parties present to sign it as witnesses, is not an unusual one. It frequently occurs in executing wills that words of request or acknowledgment come from the party who is assisting the testator in the preparation and execution of his will.

Request to witnesses, and subscription by them.

A request to sign as a witness, made by the person superintending the execution of the will, in the hearing of the testator and with his silent permission and approval, with other facts tending to show the intent, is sufficient. *Matter of Nel-*

son, 141 N. Y. 152; aff'g, 50 N. Y. St. Repr. 936, 21 N. Y. Supp. 1123.

Where there is no question about the good mental condition of the testator, and he dictated the terms of the will to the person who drew it, and that person called in two witnesses and requested them to witness the will which they did, the testator signing in their presence, and giving assent to such act — *held* valid execution. *Troup v. Reid*, 2 Dem. 471.

Where one witness in presence of testator said to the other: "It is his will. I have witnessed it and he wants you to witness it," such request and statement will be held to be that of the testator, and sufficient. *Matter of Carey*, 14. Misc. Rep. 486, 71 N. Y. St. Repr. 593, 36 N. Y. Supp. 817; aff'd, 24 App. Div. 531, 49 N. Y. Supp. 32.

Subscription by witnesses.

It is not necessary that the witnesses should subscribe in the presence of each other. *Hoysradt v. Kingman*, 22 N. Y. 372; *Willis v. Mott*, 36 N. Y. 486.

A subscribing witness may sign by mark or may authorize another person to write his name for him. *Mock v. Garson*, (*Kaufman*), 84 App. Div. 65, 82 N. Y. Supp. 310; *Matter of Jacobs*, 73 Misc. Rep. 162, 132 N. Y. Supp. 481.

Subscribing witness thoughtlessly wrote part of his name and part of the testator's when he signed as a subscribing witness — *held* a good subscription by the subscribing witness. *Matter of Jacobs*, 73 Misc. Rep. 162.

The will must be a valid perfect instrument at the time of the death of the testator. It takes effect at the instant the testator dies. If invalid then life cannot be given to it by the act of a third party. A will is not properly executed when signed after the death of the testator by a witness although the testator dies during the execution of the instrument. *Matter of Fish*, 88 Hun, 56, 68 N. Y. St. Repr. 511, 34 N. Y. Supp. 536.

One witness can write the name of the other witness.

Under a statute which requires that "there shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator," can one witness write the name of the other witness at his request, in his presence, and in presence of the testator?

This question seems to have been squarely answered in the affirmative by Surrogate Coffin of Westchester county in 1891 in the *Matter of Strong*, reported in 2 Con. Sur. 574, 39 N. Y. St. Repr. 852, 16 N. Y. Supp. 104, provided that there is affirmative evidence showing the request of the testator to the witnesses and the request of the one witness to the other, also by the Appellate Division, fourth department, in *Mock v. Garson*, 84 App. Div. 65. In 1853 Surrogate Bradford of New York decided that a witness might sign by mark, but intimated that he ought to perform some mechanical act showing that he acted as a witness. It seems now to be the settled law that a witness may properly sign by making a mark, one surrogate remarking that a contrary interpretation of the statute would invalidate many wills which ought, in justice to the people, to be admitted to probate. From making a mark to authorizing another to make a written signature is only a short step in construction. The law in other business transactions recognizes the validity of a signature made by another at the direction of the party to be bound, and if a mark is construed as a signature, a written signature made at the direction of the witness might well be construed as such. Both present the same difficulty in proving a will so signed after the death of the witnesses, and if such method of execution becomes common, many wills will not be susceptible of proof after a few years from their making. For this reason it might have been good public policy to have construed the statute strictly from the beginning, and so have made it necessary that a witness to a will should write his own name.

Order of signing.

The witness must sign after the subscription and not before. *Jackson v. Jackson*, 39 N. Y. 153.

Witnesses must write their places of residence. Person who signs testator's name must write his own as witness.

The witnesses to any will, shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions, shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who will sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid, be excused or incapacitated on that account, from testifying respecting the execution of such will.

§ 22, *Decedent Estate Law*.

An attestation clause is not necessary, and it does not invalidate a will if the witnesses fail to write their residences. *Matter of Phillips*, 98 N. Y. 267.

The three-year Statute of Limitations applicable to enforcing this penalty does not begin to run until the death of the testator. *Dodge v. Cornelius*, 168 N. Y. 242; aff'g, 40 App. Div. 18, 57 N. Y. Supp. 791.

It has been held to be a sufficient writing of the address if a notary who signs the will as a witness imprints his seal thereon which has upon it "New York County." *Bossie v. Edelson*, 76 Misc. Rep. 234, 134 N. Y. Supp. 615.

¶ 38 Execution of Holographic, Nuncupative, Duplicate and Mutual Wills.**Holographic will.**

A holographic will is one wholly written by the testator, excepting the signatures of the witnesses. Its effect and manner of proof is the same as that of other wills, but in some cases the strictness of proof of the essentials of due execution has been relaxed.

The statute makes no exception with respect to a holographic will, in its requirements as to execution. *Matter of*

Turell, 166 N. Y. 330; aff'g, 47 App. Div. 560, 62 N. Y. Supp. 1053.

Proof of holographic will.

In proving the execution of a will of that kind the evidence of its publication may be relaxed somewhat (*Matter of Akers*, 74 App. Div. 461, 77 N. Y. Supp. 643; aff'd, 173 N. Y. 620; *Matter of Beckett*, 103 id. 167, aff'g, 35 Hun, 447), but the statute makes no distinction in favor of a will of that description. *Matter of Turell*, 166 N. Y. 330; *Matter of Andrews*, 162 id. 1, aff'g, 43 App. Div. 394, 60 N. Y. Supp. 141.

Testatrix declared to one witness: "This is the paper I spoke to you about signing," and to the other who had signed a previous will for her, she said she was sorry to trouble the witness to again sign the paper — *held*, that considering it was a holographic will, the publication was sufficient. *Matter of Beckett*, 103 N. Y. 167.

Sufficient evidence of publication discussed. *Matter of Palmer*, 42 Misc. Rep. 469, 87 N. Y. Supp. 249.

Where testator subscribed will, one witness saw the signature, it was declared to both witnesses, and both signed in presence of testator and of each other — *held*, properly executed as a holographic will. *Matter of Akers*, 74 App. Div. 461; aff'd, 173 N. Y. 620.

Where the instrument was very brief, drawn wholly in testator's own hand, and, including the signatures of the testator and witnesses, was contained on a single page, so that the signature of the testator was necessarily exposed plainly to the subscribing witnesses whose signatures were immediately below that of testator, the will was admitted to probate. *Matter of Phillips*, 98 N. Y. 267.

In *Matter of Mitchell* (16 Hun, 97), in which the drafter of a holographic will did not specifically declare that he had made the subscription at the end of the will, probate was denied. The court said in that case: "Acknowledgment of the signature must include the same identification of the written words as necessarily exists when the witnesses see the tes-

tator write." And, on the proposition as to the acknowledgment of the signature, the court declares: "He never acknowledged or stated to either of them that the subscription which appears at the end of the paper was made by him. He did, it is true, declare that the whole instrument was his will. But that is not enough." *Matter of Rogers*, 52 Misc. Rep. 412, 103 N. Y. Supp. 423.

Nuncupative will; when allowed; proof required. See ¶ 36.

A soldier while in actual military service and a mariner at sea may orally make an effectual disposition of his personal estate which shall have full testamentary effect, and in addition to the general rules regarding testamentary capacity and freedom from restraint, the only essentials are that the act shall be performed with testamentary intent and shall be sufficiently explicit and intelligible to permit a finding of its purport and scope, and that its execution must be proved by at least two witnesses.

It is not considered essential to the validity of such a will that the soldier or sailor should be then *in extremis* of danger or illness, for the nature of his calling constantly holds the fear of death before his mind. *Matter of O'Connor*, 65 Misc. Rep. 403, 121 N. Y. Supp. 903.

But it is essential to remember that a will made by a soldier or a sailor without the usual formalities is not operative as to real estate, § 16 Dec. Est. Law; and that the privilege is accorded only to soldiers "in actual military service" or seamen "at sea." The term, "actual military service," signifies the exercise of military functions in the enemy's country in time of war, or in the soldier's own State or country in case of invasion or insurrection. *Van Deuzer v. Gordon*, 39 Vt. 111. According to the earlier decisions it does not apply to the soldier who is in regular quarters, or at his customary home on leave of absence (see *Re Smith*, 6 Phila. 104), or to a soldier mustered into service of the United States while he remains in barracks or is quartered at any permanent military depot in a State not exposed to the incursion of the enemy.

Leathers v. Greenacre, 53 Me. 561; *Van Deuzer v. Gordon*, *supra*. But an informal written will made while at home may become a voluntary testament by its recognition in a letter written while at the front, as expressive of the soldier's testamentary desires. (See *Van Deuzer v. Gordon*, *supra*.) The English courts, however, have latterly inclined to extend the term to a soldier who has been mobilized, but who has not yet departed for the scene of hostilities.

There is some authority to the effect that an informal will made while in active military service, unless revoked, continues in force during the testator's lifetime. See *Leese's Goods*, 17 Jur. 216; *Re Smith*, 6 Phila. 104.

Letters of a soldier in actual service were admitted to probate as a will of personal property. *In re Hickey*, 184 N. Y. Supp. 399.

A case almost similar in circumstances is to be found in *Botsford v. Krake*, 1 Abb. Prac. (N. S.) 112, where an officer in the United States army in May, 1864, wrote and sent a letter to his sister, stating that, if he was killed or did not return, he wanted her to have his property. The letter was there admitted to probate as a valid will. The theory of the law is that, from the absolute necessities of military service, the solemn and formal rules as to testaments are relaxed in favor of soldiers. *Hubbard v. Hubbard*, 8 N. Y. 196; *Matter of O'Connor*, 65 Misc. Rep. 403, 121 N. Y. Supp. 903. The proof must show capacity, *animus testandi*, apprehension of death, and the corroboration by two witnesses, required under section 141 Sur. Ct. A.

Petition for probate.

There is no requirement that the petition shall set out the exact words expected to be proved under the requirement that the petition shall describe the will propounded. *Matter of O'Connor*, 65 Misc. Rep. 403.

Wills executed in duplicate.

Where two testamentary papers are executed at the same time, with the formalities required by law, they must be taken

together to constitute the will of the testator. Where the duplicates are exactly alike the production and probate of one is sufficient, but there should be the exhibition of the duplicate as proof that they are identical in their provisions and that neither one has been revoked, since the revocation of one is the revocation of the other. Where the two papers contain different provisions, then both must be produced and admitted to probate and both constitute, when read together, the will of the testator as if all the provisions of both were contained in one instrument. *Crossman v. Crossman*, 95 N. Y. 145; aff'g, 30 Hun, 385; *Roche v. Nason*, 185 id. 128; aff'g, 105 App. Div. 256.

Where a will is executed in duplicate, it is unnecessary that each duplicate be admitted to probate and recorded. The will is single; the evidence thereof double. *Matter of Crossman*, 2 Dem. 69.

The destruction of one duplicate will with the intent to revoke it requires the denial of probate to the undestroyed duplicate. *Asinari v. Bangs*, 3 Dem. 385.

Two wills may be probated as one will although not duplicates.

More than one will may exist at the same time, and they may be construed together if such was the intention of the testator, and the contents of the later will may be shown to determine the testator's intention. Jarman on Wills (6th ed.), 171. *Matter of Cunnion*, 201 N. Y. 123; aff'g, 135 App. Div. 864.

The fact that the two instruments may in some respects be repugnant is no reason why probate should be denied. *Matter of Forman*, 54 Barb. 274.

One duplicate was probated without the production of the other. After many years but before final distribution the other duplicate was found which was not exactly like the probated one. This was offered for probate and used on the settlement in connection with a codicil. *Matter of Van Doren*, 77 Misc. Rep. 44, 137 N. Y. Supp. 420.

Mutual and reciprocal wills.

There is no reason in law nor any public policy which stands in the way of parties agreeing between themselves to execute mutual and reciprocal wills, which, though remaining revocable upon notice being given by either of an intention to revoke, become, upon the death of one, fixed obligations of which equity will assume the enforcement, if attempted to be impaired by subsequent testamentary provisions on the part of the survivor. *Edson v. Parsons*, 155 N. Y. 555; aff'g, 85 Hun, 263, 66 N. Y. St. Repr. 440, 32 N. Y. Supp. 1036; *Matter of Perkins*, 68 Misc. Rep. 255, 124 N. Y. Supp. 998.

Two parties may join in executing the same paper as the will of each. *Matter of Raupp*, 10 Misc. Rep. 300, 64 N. Y. St. Repr. 305, 31 N. Y. Supp. 680.

To establish agreement for mutual wills and defeat the right to revoke a will, there must be full and satisfactory proof of the agreement, and such proof cannot be supplied by presumptions. *Edson v. Parsons*, 155 N. Y. 555.

An agreement signed by husband and wife to take effect upon the death of the one first dying — held to be a mutual will and valid. *Matter of Diez*, 50 N. Y. 88.

The mere making of mutual wills is insufficient to indicate a binding contract, irrevocable after the death of either party, even though the provisions in both wills are identical, but it will be given weight as some evidence showing a contract. *Wallace v. Wallace*, 71 Misc. Rep. 305, 130 N. Y. Supp. 58.

When mutual wills have been made pursuant to an agreement and one of the makers, a woman, marries, her will is revoked, and the contract does not survive. *Near v. Shaw*, 76 Misc. Rep. 303, 137 N. Y. Supp. 77.

Evidence of the contract which makes mutual or joint wills binding upon the survivor, may be found in the will itself. *Rastetter v. Hoenninger*, 151 App. Div. 853, 136 N. Y. Supp. 961.

CHAPTER XI.

Revoking, Republishing and Reviving Wills and Codicils.

- ¶ 39. How a will may be legally revoked.
Republishing and reviving.
Revocation by marriage, and by marriage and birth of issue.

¶ 39 How and When a Will is Legally Revoked.

Written will, how to be revoked or cancelled.

No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction shall be proved by at least two witnesses.

§ 34, *Decedent Estate Law*.

This statute permits the revocation of a will in three ways: (a) By some other will in writing; (b) by some other writing of the testator, declaring such revocation and executed with the same formalities with which the will itself was required by law to be executed; (c) by burning, tearing, canceling, obliterating, or destroying with the intent and for the purpose of revoking the same. But the statute permits a will to be altered only in one or the other of the first two methods described. The tearing or obliteration of one clause in a will, although with a purpose of revoking the same and permitting the remainder of the will to stand, is not effectual for that purpose. No tearing or obliteration can be effectual, unless it altogether destroys the whole will and was intended so to do. *Lovell v. Quitman*, 25 Hun, 537; aff'd, 88 N. Y. 377, 42 Am. Rep. 254; *Burnham v. Comfort*, 108 N. Y. 535, 540, 15 N. E. 710, 2 Am. St. Rep. 462; *Matter of Curtis*, 135 App. Div. 745, 119 N. Y. Supp. 1004.

To revoke a will the testator must have the same mental condition as to duly execute a will. *Matter of Waldron*, 19 Misc. Rep. 333, 44 N. Y. Supp. 353.

Revocation by codicil.

A codicil will not operate as a revocation of a will beyond the clear import of its language, and it never so operates on the ground of repugnancy, save when necessary, and only so far as necessary to give the codicil effect. *Viele v. Keeler*, 129 N. Y. 190; *Delafield v. Parish*, 25 id. 9.

Where a codicil revokes the whole will excepting the clause naming an executor — *held*, that the will should be probated. *Newcomb v. Webster*, 113 N. Y. 191; dist'g, 80 App. Div. 342, 80 N. Y. Supp. 725.

A codicil will not operate as a revocation of previous testamentary provisions beyond the clear import of its language. An expressed intention to make a change in a will in one particular negatives, by implication, an intention to alter it in any other respect. *Redfield v. Redfield*, 126 N. Y. 466; *Viele v. Keeler*, 129 id. 190; *Goodwin v. Coddington*, 154 id. 283.

A codicil is the latest expression of the testator's intentions and must be held to control any prior provision of the will. *O'Donoghue v. Boies*, 159 N. Y. 87, 96.

Revocation by a later will.

One of the methods prescribed for revoking a will is by making a new will containing a clause revoking all former wills. The due execution of such a will revokes a prior will of itself.

A will, however, may have no words showing a revocation of an earlier will, and in that case the two wills may be probated and construed together as one will. *Matter of Pilsbury*, 50 Misc. Rep. 367, affirmed without opinion by a divided court in 186 N. Y. 545. Where in such a will which does not revoke a prior will, an invalid trust is attempted to be created by the use of a power of appointment, such attempted disposition does not revoke a valid disposition of the same property in

the prior will, although the attempted disposition is repugnant to that contained in the prior will. *Matter of Pilsbury*, supra.

Where it appears that the last of a series of wills disposes of all the estate, and leaves nothing upon which the former wills can operate, it will be held that the last will revoked the prior wills. *In re McMullen's Will*, 159 N. Y. Supp. 98.

Later will lost or destroyed. See ¶ 51.

A later will containing a revoking clause may revoke a prior will even though it cannot be admitted to probate as a lost or destroyed will. Proof of its due execution need not be the same to show the revocation of a prior will, as would be necessary to admit it to probate as a lost or destroyed will. *Matter of Wear*, 131 App. Div. 875, 116 N. Y. Supp. 304.

A lost or destroyed will in terms revoking all former wills, duly proved although the original is not produced, would not permit the revival of a prior will. *Matter of Myers*, 28 Misc. Rep. 359, 59 N. Y. Supp. 908.

If it be determined that a later will was made by an incompetent, and at or about the same time the earlier will was destroyed, the act of revocation would be that of one incapable of revoking a will, and the earlier will would be revived. *Bethany M. E. Ch. v. Brooks*, 143 App. Div. 685, 128 N. Y. Supp. 250.

Revocation by a later will, not produced, will not be found from oral testimony of a witness to the later will who only was told that it contained a clause revoking all former wills. *Colligan v. McKernan*, 2 Dem. 421.

Where a later will is not produced, and the witnesses are unable to state its date or contents, it will not be held that the former will was revoked. *Matter of Williams*, 34 Misc. Rep. 748, 70 N. Y. Supp. 1055.

Probate of a will offered will be denied where it is proved that subsequently another will was duly executed which revoked the former one, although the subsequent will has not been offered for probate and has been lost. *Moore v. Griswold*, 1 Redf. 388; *Matter of Barnes*, 70 App. Div. 523, 75 N.

Y. Supp. 373; *Matter of Brewster*, 72 App. Div. 587, 76 N. Y. Supp. 283; *In re Horton*, 148 N. Y. Supp. 18.

Revocation of will by revoking codicil.

Provisions of codicil so dependent upon terms of will that revoking the codicil was held to revoke the will. *Matter of Brookman*, 11 Misc. Rep. 675, 33 N. Y. Supp. 575.

A codicil may be revoked without thereby revoking the will. *Osburn v. Rochester T. & S. D. Co.*, 152 App. Div. 235, 209 N. Y. 54.

Effect of revoking codicil.

Where by a codicil an additional legacy is given, and the codicil is revoked and the will is not thereby revoked, the effect upon the will is to leave the legacy given by the codicil unbequeathed. *Osburn v. Rochester T. & S. D. Co.*, 209 N. Y. 54.

Codicil may become will on revocation of will.

Where a will has been revoked, but the codicil has not been, the codicil may fall with the will when its provisions are so interdependent or so interinvolved that it is not capable of separate existence as an instrument expressing the intention of the testator, but if otherwise it may be proved and stand as the will. *Matter of Nokes*, 71 Misc. Rep. 382; 130 N. Y. Supp. 187; *Matter of Francis*, 73 Misc. Rep. 148, 132 N. Y. Supp. 695.

Revoking second will, not to revive first.

If, after the making of any will, the testator shall duly make and execute a second will, the destruction, cancelling or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless after such destruction, cancelling, or revocation, he shall duly republish his first will.

§ 41, *Decedent Estate Law*.

Revocation by cancelling, obliterating, burning or destroying.

The word "cancel" is derived from the word "cancelli," crossbars or lattice work. Hence, as originally used, referred to making crosslines on writing. From this is derived the

synonym, as defined by Webster: "To annul or destroy; as, to cancel an obligation or a debt."

Therefore, where it is apparent that the crosslines have been made by the testator, with the evident intention of affecting a revocation, it has been held that such act is sufficient to work a revocation of the will.

There is no doubt that originally, the word "cancel" was confined to the making of crosslines, indicating the lattice work from which it was derived, and grew to be adopted for such purposes in consequence of the fact that in early times few persons were capable of writing, and, therefore, were permitted to manifest their intention by drawing lines across the face of a paper. It has not been held necessary that such lines on the face of a paper should be crosslines, and, in fact, it has been held that a single line drawn across a sheet of paper is sufficient to effect a cancellation of the same, if it be shown to have been done for the purpose of revoking an instrument.

In considering what is a sufficient revocation by canceling, it will be also instructive to examine what has been held to be sufficient revocation by way of burning, tearing, or destroying the same, and the courts have repeatedly held that it is not necessary in order for a will to be revoked by burning, that it should be completely consumed by the fire, or for a will to be revoked by tearing, that it should be completely torn into pieces, but that where the testator desired to revoke the will and threw the same into the fire and the same has been but slightly scorched, so that the handwriting is still legible, that still was a sufficient revocation. It has also been decided that where a seal was appended to a will, and which was unnecessary, has been torn off by the testator for the purpose and with the intention of revoking the same, although he has not torn the signature off, or any part of the writing of the will, that there was a sufficient tearing of the same to effect a revocation.

The rule upon this point is well settled in *Dan v. Brown* (4 Cow. 483, 490), in which the court states as follows: "There

must be a canceling *animo revocandi*. Revocation is an act of the mind, which must be demonstrated by some outward and visible sign of revocation. The statute has prescribed four. If any of them are performed in the slightest manner, joined with a declared intent to revoke, it will be an effectual revocation."

In 2 Am. L. Cas. 689 it was said: "All that is necessary to a revocation is an absolute revoking intention, manifested by any act, however slight in its nature, which can fairly be considered as a tearing, burning, canceling, or obliterating, within the meaning of the statute." *Matter of Alger*, 38 Misc. Rep. 144, 77 N. Y. Supp. 166.

Where parts of a will are obliterated with the intention of canceling any such parts and not the whole will, the will including such parts, if they can be proved, should be probated. *Lovell v. Quitman*, 88 N. Y. 377; overruling *McPherson v. Clark*, 3 Bradf. 96; aff'g, 25 Hun, 537.

The most celebrated case of cancellation by pen marks is *Matter of Hopkins* (172 N. Y. 360, 73 App. Div. 559), in which the doctrine of presumptive revocation is declared where the will is found in the possession of the deceased, but that case turns upon the point that a thorough search did not bring to light the will among the papers of the deceased, but when later it was found in one of the places formerly searched, it was canceled.

Where a large part of the will is torn and mutilated, it does not indicate an intention to destroy the whole will, and the whole will should be probated. *Matter of Van Woert*, 147 App. Div. 483; revg. 71 Misc. Rep. 372; 207 N. Y. 756.

Presumption of revocation by nonproduction may be rebutted by proof showing that the testator had not revoked the will. *Matter of Pattison*, 78 Misc. Rep. 699, 140 N. Y. Supp. 478.

The presumption is that where the will was in the custody of the decedent and at the time of his death is found canceled, that it has been so canceled for the purpose of revoking the same. When such a will is presented it is with the infirmity of

the cancellation upon it as part of it. In the absence of any evidence whatever from which the inference or presumption could be drawn of improper treatment of the will, cancellation for the purpose of revoking will be presumed. *Matter of Philip*, 46 N. Y. St. Repr. 356, 19 N. Y. Supp. 13; *Matter of Miller*, 50 Misc. Rep. 70, 100 N. Y. Supp. 344.

Revocation by writing on the original will.

The great weight of authority is to the effect that a mere writing upon a will which does not in anywise physically obliterate or cancel the same, is insufficient to work a destruction of the will by cancellation, even though the writing may express an intention to revoke and cancel. Where a will is sought to be revoked solely by writing, it must conform in that respect to the requirement of the statute, and failing in that, it does not revoke the will, even though there may be a clear intention so to do. *Matter of Akers*, 74 App. Div. 461; aff'd, 173 N. Y. 620.

Writing on the back of a will and signing a statement that such will is revoked is not a valid revocation thereof. *Matter of Miller*, 50 Misc. Rep. 70.

A will found in the safe of deceased having pen marks through his signature and the words "am going to make a new will," written by deceased below his signature, will be held to be revoked. *Matter of Miller*, 51 Misc. Rep. 156, 100 N. Y. Supp. 849.

Signature canceled with ink lines and alongside of the name was written "May 26 '92, void H. D. B."—*held*, a revocation. *Matter of Brookman*, 11 Misc. Rep. 675, 67 N. Y. St. Repr. 397, 33 N. Y. Supp. 575.

Drawing a pen through a provision of a will and writing on the margin, "I pronounce this void, July 24, 1878," is not a sufficient revocation of the entire will nor of those particular portions, and the will should be probated in its entirety. *Gugel v. Vollmer*, 1 Dem. 484.

Writing upon the margin of a codicil, "this will and codicil is revoked Jan'y. 14, '96," and signed by testator, does not re-

voke the codicil or will. *Matter of Akers*, 74 App. Div. 461; aff'd, 173 N. Y. 620.

It has been held that writing over the whole will words of revocation is a canceling. *Matter of Barnes*, 76 Misc. Rep. 382, 136 N. Y. Supp. 940.

Revoked by its own terms.

A will can not be revoked by stating in it that it will become inoperative upon the happening of a certain event, like marriage. *Matter of Steiner*, 89 Misc. Rep. 66, 152 N. Y. Supp. 725.

Revoked by "some other writing;" deed.

A deed in terms revoked a prior will. It was executed before witnesses but not published as a will, but it was held to have been executed with the same formalities as a will and to revoke the will. *Matter of Backus*, 49 App. Div. 410, 63 N. Y. Supp. 544; revg. 29 Misc. Rep. 448.

A letter to the custodian of a will directing its destruction is not a legal revocation where the will was not destroyed in accordance with the direction. *In re McGills*, 229 N. Y. 405, aff'g, 107 Misc. Rep. 109, 177 N. Y. Supp. 86, 191 App. Div. 76, 181 N. Y. Supp. 48.

Revocation by instruction to another.

Direction to another to destroy a will is not a good revocation where such direction is not carried out. *Matter of Evans*, 113 App. Div. 373.

Revocation by the act of another at the request of the testator must be done in the presence of the testator. *Matter of Hughes*, 61 Misc. Rep. 207, 114 N. Y. Supp. 929.

Of mutual wills by agreement.

An agreement that mutual wills should remain operative only upon certain conditions, will not work a revocation when such condition occurs. *Matter of Goldsticker*, 123 App. Div. 474; aff'd, 192 N. Y. 35.

Presumption of revocation by nonproduction.

When it is proved that an instrument executed as a will can not be found after the death of its maker, a presumption arises that it was revoked by him in his lifetime. *Hamersley v. Lockman*, 2 Dem. 524; *Matter of Wear*, 131 App. Div. 875, 116 N. Y. Supp. 304.

If a will, shown once to have existed and to have been in the testator's possession, cannot be found after his death, the presumption is that he destroyed it, *animo revocandi*, but this presumption may be rebutted by evidence. *Matter of Kennedy*, 167 N. Y. 163; *Collyer v. Collyer*, 110 id. 481; *Matter of Cunnion*, 201 id. 123.

Presumption of revocation by nonproduction may be rebutted by proof showing that the testator had not revoked the will. *Matter of Pattison*, 78 Misc. Rep. 699, 140 N. Y. Supp. 478.

Presumption of revocation.

Where the will was not in the possession of the testator, there is no presumption of legal revocation if the will can not be found after death. *In re Gethin*, 97 Misc. Rep. 561, 163 N. Y. Supp. 398.

Declaration.

Declarations of the testator may be received to rebut *animo revocandi* where it is shown that the will was destroyed by the testator, and also where the will is not produced. *In re Rowe*, 165 N. Y. Supp. 1064.

Revocation of duplicate will.

Where one of two duplicate wills has been properly revoked, the other is thereby revoked. Therefore, both should be presented on probate or accounted for to overcome the presumption of revocation which might arise from unexplained nonproduction.

The revocation of a will executed in duplicate will be presumed, although one copy only was proved to have been de-

stroyed with the intention of revoking it, it appearing that the other had not been seen at any time after its execution in testatrix's possession. *Asinari v. Bangs*, 3 Dem. 385.

Duplicate taken from safe by testator and not found after his death and after careful search, will be presumed to have been destroyed with intention to revoke. *Matter of Schofield*, 72 Misc. Rep. 281, 129 N. Y. Supp. 190.

How will may be republished.

The republication cannot be made to other persons than those who sign as subscribing witnesses. *Matter of Stickney*, 161 N. Y. 42; aff'g, 31 App. Div. 382, 52 N. Y. Supp. 929.

Republishing by codicil. See ¶ 65,

C. made a will in 1897 and another in 1899. In 1900 she made a codicil to the 1897 will — *held*, that the will of 1897 was thereby republished and took effect as of the date of the codicil. *Matter of Campbell*, 170 N. Y. 84; aff'g. 67 App. Div. 627, which aff'd, 35 Misc. Rep. 572, 72 N. Y. Supp. 55; *Brown v. Clark*, 77 N. Y. 369.

M. executed a codicil which simply gave directions about his funeral. His daughter, the primary legatee in his will, had died — *held*, that the codicil republished the will and made certain substituted legatees in case of his daughter's death, primary legatees under the conditions which existed at the date of the codicil. *Matter of Miller*, 11 App. Div. 337, 42 N. Y. Supp. 148; aff'd, 161 N. Y. 71.

Republication by codicil. *Illensworth v. Illensworth*, 39 Misc. Rep. 194, 79 N. Y. Supp. 410; modified in 110 App. Div. 399.

A republication by means of codicil will not revive a satisfied legacy. *Langdon v. Astor's Exr.*, 16 N. Y. 9.

K. made a will in 1885 and in 1889 made another. In 1890 he made a codicil to the 1889 will and stated therein that he ratified and confirmed the will of 1885 and attached the codicil thereto — *held*, that the will of 1885 was revived. *Matter of Knapp*, 51 N. Y. St. Repr. 517, 23 N. Y. Supp. 282.

Revocation by marriage and birth of issue after making will.

If after making any will, such testator marries, and the husband or wife, or any issue of such marriage, survives the testator, such will shall be deemed revoked as to them, unless provision shall have been made for them by some settlement, or they shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and such surviving husband or wife, and the issue of such marriage, shall be entitled to the same rights in, and to the same share or portion of the estate of said testator as they would have been, if such will had not been made. No evidence to rebut such presumption of revocation shall be received, except as herein provided.

§ 35, *Decedent Estate Law*.

This section was amended as shown above by chap. 293 L. 1919, making the section apply to wills of males and females alike, and section 36 Dec. Est. Law which applied to females only was repealed.

The early history of implied revocation of wills by birth of issue is set forth by Chancellor Kent, in *Brush v. Wilkins*, 4 Johns. Ch. 509. Later it was written into the Revised Statutes of 1830, pt. 2, c. 6, tit. 1, art. 3, § 43. This principle of the law was kept in the present Decedent Estate Law, § 35, and continued until September 1, 1919, when the section was entirely revamped and rewritten. Formerly the law provided that, if after the making of a will disposing of the whole estate, the testator shall marry and have issue of such marriage, born either in his lifetime or after his death, and the wife, or issue of such marriage, shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue. *Matter of Andrest*, 96 Misc. Rep. 389, 160 N. Y. Supp. 505; *Matter of Del Genovese*, 169 App. Div. 140, 154 N. Y. Supp. 806. The foundation of the principle of this implied revocation was a tacit condition annexed to the will that the party does not then intend that it should take effect, if there should be a total change in the situation of his family.

The doctrine of implied revocation is supported by broad public policy and the soundest principles of justice and equity. It was based upon the presumed alteration of intention arising from new moral duties, the birth of offspring. For many

years a woman's will was revoked by marriage alone, but section 36 of the Decedent Estate Law was repealed in 1919, when the present section 35 was enacted. Men and women are now on a parity in that respect. Revocation works no hardship; it brings about a descent and distribution under the just and politic rules prescribed for intestacy and aims for the care and protection of descendants. *In re Schuster*, 181 N. Y. Supp. 500.

Marriage of an unmarried man after making a will revokes that will, as it does the will of a woman.

This amendment is not retroactive. (*In re Cutlér's Will*, 186 N. Y. Supp. 271), and therefore if the will was executed before Sept. 1, 1919, it is not revoked for that reason alone. *Matter of Gaffken*, 188 N. Y. Supp. 852.

If a man makes the will in another State where marriage alone revokes it, but comes to this State and marries and dies here before Sept. 1, 1919, the revocation is governed by the laws of this State, and not by the law of the State in which it was made. *In re White*, 183 N. Y. Supp. 129, 112 Misc. Rep. 433.

See also *Matter of Coburn*, 1 Gibb Sur., Rep. 119, 9 Misc. Rep. 437.

Cases construing section 35 before its amendment and section 36 now repealed. *Wormser v. Groce*, 104 N. Y. Supp. 1090, 120 App. Div. 287; *Stachelberg v. Stachelberg*, 124 App. Div. 232, aff'd 193 N. Y. 576.

Partial intestacy by death of legatee. *Matter of Rossignat*, 50 Misc. Rep. 231, 100 N. Y. Supp. 623.

Ignorance of existence of child. *Ordish v. McDermott*, 2 Redf. 460.

Provision effective though no title vests. *McLean v. McLean*, 207 N. Y. 365.

Applied to females. *Luce v. Burchard*, 78 Hun, 537, 60 N. Y. St. Rep. 770; *Matter of Murphy*, 144 N. Y. 557; *Matter of Del Genovese*, 56 Misc. Rep. 418, aff'd 136 App. Div. 894, 120 N. Y. Supp. 1131.

Effect of widowhood. *Matter of Union Trust Co.*, 179 N. Y. 261; *Matter of Kaufman*, 131 N. Y. 620; *Matter of McLarney*, 153 N. Y. 416.

Effect of divorce. *Matter of Burton*, 4 Misc. Rep. 412, 25 N. Y. Supp. 824.

Affects power of appointment. *Matter of McClure*, 105 Misc. Rep. 347, 173 N. Y. Supp. 206.

Adopting child. *Matter of Gregory*, 15 Misc. Rep. 407, 37 N. Y. Supp. 925.

Action by after born child.—An action to recover his share of the estate may be maintained by an after-born child. Consult section 28, Decedent Estate Law. See ¶ 447.

Property increased after making will.

Under the prohibition of our statute proof of increased property after the making of the will cannot avail to repeal the statutory rule to revoke a disposing testament not being made in view of marriage and parenthood, with no provision in the will, or out of it, looking to such duties. *In re Del Genovese's Will*, 154 N. Y. Supp. 806, aff'd, 169 App. Div. 140.

CHAPTER XII.

Obtaining Possession of the Will and Preparing to Offer it for Probate. Probate by Action in the Supreme Court.

- ¶ 40. Possession, production and disposition of will.
Authorized places of deposit.
Penalty for destroying or concealing will.
- § 137. Proceeding to obtain information, or possession of will.
Opening and reading will, preparing to offer it for probate.
- ¶ 41. § 223. Power and duty of executor before probate.
- ¶ 42. Concurrent jurisdiction of supreme and surrogate courts.
§ 200. Probate by action.
Power of executor not superseded pending action.

¶ 40 Possession, Production and Disposition of the Will.

Where a will is left it may usually be found among the papers of the deceased. Any member of the family or person interested may make an examination of the papers in order to ascertain whether or not a person left a will. If no will is found among the papers to which any member of the family or person interested has access, it may be found in one of several places. Very often a will is left in the care and custody of the lawyer of the deceased or of the person who drew the will, and he may properly be applied to to ascertain the fact as to whether or not a will was left.

The hiring of safe-deposit boxes is becoming quite common, and often a will may be found in such boxes. The person hiring the box usually has one key and the company usually has the other key, and it is necessary for both keys to be used in opening the box. Sometimes there is difficulty in getting the safe-deposit company to allow the will to be taken from the box, due largely to a mistaken notion on the part of the company that it has no legal right to remove or allow the removal of such a paper; if, however, the will is found in such deposit box, the proper course is for the safe-deposit company or other custodian thereof to deliver it to the person named as

executor therein and take his receipt therefor, or the will may be delivered to the surrogate for filing by him.

Under the rules made by the State Tax Commission to insure the payment of transfer taxes, a safe-deposit box cannot be opened without the presence of the attorney for the Commission. There is usually such a representative in each county, who upon request will be present and allow the box to be opened and the will to be taken out.

If no will is found in any of these places, it still may be found upon file with the county clerk or the surrogate or with the registrar of deeds in the city and county of New York, since special provision has been made by law for the deposit of wills for safekeeping with such officers.

If, however, the deposit company will not grant the request, an order to that effect may be granted, not only to obtain a will, but also to obtain a deed of a burial lot. By our illogical method of tacking new laws on old laws dealing with unrelated subjects we find the provision for obtaining this order in section 228 of the Tax Law as amended in 1920, and it is as follows:

When it is made to appear to a surrogate of any county in this state that a safe deposit company, trust company, bank, person or corporation has in its possession or under its control papers of a decedent of whose estate such court has jurisdiction, or that the decedent had leased from such a corporation a safe deposit box, and that such papers or such safe deposit box may contain a will of the decedent, or a deed to a burial plot in which the decedent is to be interred, he may make an order directing such safe deposit company, trust company, bank, person or corporation to permit a person named in the order to examine such papers or safe deposit box in the presence of a representative of the comptroller of the state of New York and an officer of such safe deposit company, trust company, bank or corporation, or agent of such person, and if a paper purporting to be a will of the decedent, or the deed to a burial plot is found among such papers, or in such box, to deliver such will to the clerk of the surrogate's court of such county, or such deed to such person as may be designated in such order. The clerk of said court shall furnish a receipt upon the delivery to him of the will.

From § 228, Tax Law.

Deposit of will for safe-keeping.

The Decedent Estate Law, §§ 30-33, regarding the deposit of wills for safe-keeping, provides as follows:

Reception of wills for safe-keeping.

The clerk of every county in this state, and the surrogate of every county, upon being paid the fees allowed therefor by law, shall receive and deposit in their offices respectively, any last will or testament which any person shall deliver to them for that purpose, and shall give a written receipt therefor to the person depositing the same. § 30.

Sealing and endorsing wills received for safe-keeping.

Such will shall be enclosed in a sealed wrapper, so that the contents thereof cannot be read, and shall have endorsed thereon the name of the testator, his place of residence, and the day, month and year when delivered; and shall not, on any pretext whatever, be opened, read or examined, until delivered to a person entitled to the same, as hereinafter directed. § 31.

Delivery of wills received for safe-keeping.

Such will shall be delivered only,

1. To the testator in person; or,
2. Upon his written order, duly proved by the oath of a subscribing witness; or,
3. After his death to the persons named in the endorsement on the wrapper of such will, if any such endorsement be made thereon; or,
4. If there be no such endorsement, and if the same shall have been deposited with any other officer than a surrogate, then to the surrogate of the county.

§ 32.

Opening wills received by surrogate for safe-keeping.

If such will shall have been deposited with a surrogate, or shall have been delivered to him as above prescribed, such surrogate, after the death of the testator, shall publicly open and examine the same, and make known the contents thereof, and shall file the same in his office, there to remain until it shall have been duly proved, if capable of proof, and then to be delivered to the person entitled to the custody thereof; or until required by the authority of some competent court to produce the same in such court. § 33.

Penalty for destroying, mutilating or concealing will or other testamentary instrument.

A person who steals or for any fraudulent purpose destroys, mutilates or conceals a will, codicil or other testamentary instrument, or who aids, assists, advises or conspires with another to steal or for any fraudulent purpose to destroy, mutilate or conceal a will, codicil or other testamentary instrument shall be guilty of a felony punishable by imprisonment for not more than five years or by a fine not exceeding one thousand dollars, or by both. An indictment for a violation of this section need not contain any allegations of value or ownership. No person shall be excused from attending and testifying or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial, for a violation of any of the provisions of this section, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a

penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding. § 2052, *Penal Law*.

Proceeding to obtain information as to the existence of a will and the custody thereof.

Where a person interested has good reasons to believe that a will is in existence, or that a certain person has the custody and control thereof, he may have an inquiry before the surrogate as to such facts.

This cannot be accomplished by the issue of a subpoena for such purpose, for the surrogate can issue a subpoena only in the course of a proceeding pending before him. But it may be done in either of two proceedings, namely: on application for grant of letters of administration, or on application for probate.

Where an application for letters of administration is made, it becomes the duty of the surrogate to determine whether or not the deceased died intestate, and for that purpose he may issue a subpoena to obtain evidence upon which to decide that question. (§ 20 Sur. Ct. A.)

An application for probate of a will may be made, even though the petitioner has not the possession of the will, by any person interested setting forth the reasons which lead him to believe that a person or persons therein named has or have information regarding the existence of a will or of the custody and control of the same, and thereupon the surrogate will issue a subpoena to such person or persons requiring him or them to appear and be examined in regard to these matters, whereupon an order may be made as justice shall require.

Special proceeding to aid in discovery of will.

The Legislature in 1910 made the concealment or destruction of a will a felony. (*Penal Law*, § 2052.)

At the same time there was added to the Code of Civil Procedure, § 2621-a, which was designed to enable parties inter-

ested to have an examination of any person who was suspected of having any knowledge about the existence or disappearance of a will. This section is now as follows:

Petition to compel production of will.

Whenever it shall appear by petition of any person claiming to be interested in the estate of a decedent, that there is reasonable ground to believe that any person has destroyed, retained, concealed, or is conspiring with others to destroy, retain or conceal a will or testamentary instrument of a decedent, or has any knowledge as to such facts, the court must make an order requiring the respondent to attend and be examined in the premises, and may in such order or otherwise in the proceeding require the production of any will or testamentary instrument. Service thereof must be made by delivery of a certified copy thereof to the person or persons named therein and the payment or tender to each of the sum required by law to be paid or tendered to a witness who is subpoenaed to attend a trial in surrogate's court.

§ 137, *Sur. Ct. A.* Former § 2607, *Code Civ. Pro.*

Under the former section, there was a decision which held that the proceeding could be maintained even where one will had been probated. *Matter of Work*, 151 App. Div. 707; revg. 76 Misc. Rep. 403.

This section has been passed upon and construed *In re Hardy*, 216 N. Y. 132, where it was held that an order made in the proceeding is a final order and is appealable, and where the question as to who may maintain the proceeding as a person interested is discussed.

In the same case Judge Chase speaking of the purpose of the section said:

"Section 2621-a of the Code of Civil Procedure was new in 1910. It was rewritten in 1914 and continued as section 2607. This section of the Code contemplates a proceeding in advance of the proceeding to probate the will to carry out and make practical the procedure in surrogate's court, as it had long existed and as it is now regulated by express rule adopted in several of the counties of the state, requiring the production of the will sought to be probated."

The proceeding under section 137 was not intended and should not be used merely as a sort of discovery proceeding to ascertain evidence to be used in an action in another court. In *Estate of Denham*, 182 N. Y. Supp. 90, affirmed 180 App. Div. 935, 167 N. Y. Supp. 1095, it was held that a proceeding in this

court could not be used merely as a sort of examination before trial for the real litigation in another court. *Matter of Sielcken*, 188 N. Y. Supp. 386.

Opening and reading the will.

Whenever the death of any person occurs it becomes the immediate duty of that person who happens to be in a position of authority at that time, whether he be an interested or disinterested person, to ascertain whether or not the deceased left a will. The proper and orderly conduct of all affairs from that moment often depends upon the fact whether the deceased did or did not leave a will.

If a will be found inclosed in a sealed envelope or wrapper and the name of the executor is marked thereon, it should be delivered to him unopened without delay. The executor may open and read such will either alone or in the presence of the relatives as shall seem to be most convenient. If the will should be opened by the executor at once, it may thereafter be read to the relatives after the funeral, as has been the custom from time immemorial. If the will be found unsealed or without the name of the executor indorsed on its wrapper, any person may open the same and read it, and thereupon he should immediately deliver it to the executor named therein.

It is often important to open and read the will before the funeral, since it may contain directions respecting the funeral and burial of the deceased which ought to be carried out. It is also important in those cases where there are no near relatives to assume the expense and control of the funeral and burial, to know the name of the executor so that such arrangements may be made by him or with his consent.

After a will has been publicly or privately read it should be left in the possession of the executor or one of the executors named therein. If no executor is named in the will, or if the executor named therein is dead, any person interested thereunder is a proper custodian of the will and is a proper person to make application for its probate.

¶ 41 The Executor Should Present the Will for Probate; Power of Executor Before Probate.

Preparing to offer will for probate.

It is the duty of the executor, or, if there be none, of any party interested, to take the necessary steps to procure probate of the will. To this end a competent lawyer should be engaged to conduct the proceeding, since it is inadvisable, if not impossible, for the ordinary layman to draw the necessary papers and conduct the proper proceedings to obtain probate of the will.

Great care should be taken to ascertain the names, places of residence, and approximate ages of all the heirs-at-law and next of kin of the deceased, since the validity of the probate and perfect title to real estate left by the deceased depends wholly upon the giving of proper notice of probate to all of such persons.

The importance of giving exact information as to who constitute the legal heirs-at-law and next of kin of the deceased is usually not properly appreciated.

Every person who, in the event of the testator dying without a will, would be entitled to share in his estate must be properly notified by citation that he may attend before the surrogate on a day fixed for the probate of the will. He can not be deprived of his natural right to the property of the deceased unless he has his day in court to object, if he so desires, to the establishment of the paper which may deprive him of such natural right. In many cases none but a competent lawyer can decide who, in a given case, are the heirs-at-law and next of kin of a certain person.

If, after a careful and thorough investigation, all of such heirs-at-law and next of kin cannot be located with absolute certainty, provision is made for the service of citation upon unknown heirs-at-law and next of kin by due and proper publication thereof.

Where the heirs-at-law and next of kin are fully known, over twenty-one years of age, and easily communicated with, they

may consent to acknowledge before a notary a waiver of the issue and service of a citation to attend the probate, and upon such consents the will is often probated without the issue of citation returnable on a fixed day.

Power of executor before probate.

An executor named in a will has no power to dispose of any part of the estate of the testator before letters testamentary are granted, except to pay funeral charges, nor to interfere with such estate in any manner further than is necessary for its preservation.

Power and duty of executor before probate.

An executor named in a will has no power to dispose of any part of the estate of the testator before letters testamentary are granted, except to pay funeral charges, nor to interfere with such estate in any manner further than is necessary for its preservation. § 223, *Sur. Ct. A.* Former § 2693, *Code Civ. Pro.*

Rights and duties of executors before probate.

By statute the executors are deprived of power to dispose of the property, except for the purpose of paying funeral charges, or to interfere with it, except so far as necessary for its preservation until letters are granted to them by the public authorities after an adjudication that the will is executed by a competent person and with the necessary legal formality. But these limitations upon the powers for the purposes of administration do not affect their title, possession, or control of the property in the sense in which these terms are used in the statute. When a deceased person has disposed of his personal estate by will, the title, possession, and control thereof, from the moment of his death, must be vested in some one, and in the absence of some wrongful interference by a stranger, it is in the person designated for that purpose by the deceased owner in the instrument by which he has made the disposition.

The executor derives his appointment and his title to the estate from the will, though he is without any substantial power of disposition or administration until the probate court grants

him authenticated evidence of his title and his right in the form of letters testamentary upon proof of the will.

The will is the source of the executor's title and general powers. The letters testamentary, founded upon the probate of the will, do not create the executor nor confer title upon him, but are the authentic evidence of the power conferred by the will and which existed before they were granted. *Hartnett v. Wandell*, 60 N. Y. 346; revg. 2 Hun, 552. The property of the testator is in the legal custody of the executor appointed by will, before probate, and he may exercise many of the powers of an owner over it. He cannot dispose of it, but he may take it into his manual possession for safe-keeping. *Van Schaack v. Saunders*, 32 Hun, 515; *Smith v. Northampton Bank*, 4 Cush. 1; *People ex rel. Gould v. Barker*, 150 N. Y. 52; aff'g, 90 Hun, 609.

Duty as to care of property.

It usually happens that there are near relatives of the deceased living with such deceased in whose care and custody property is left, so that it is not in such cases necessary for the executor to take such property into his actual custody and control, although in such cases the executor must remember that the property is nominally in his charge and that he must exercise with regard thereto such control as will involve its preservation and its safety. In other cases where there is no responsible person in charge of the property it is the duty of the executor to assume the immediate care and control of it so that it may be preserved and protected for the persons eventually entitled to receive it.

Perishable property.

It often happens that there is left perishable property in various forms and this needs immediate and intelligent care in order that it may be protected and preserved or realized upon by an immediate sale; all expenses incurred in protecting and preserving the property will be allowed as charges against the estate. The power to protect and preserve the

property includes the power to sell perishable property where a sale is absolutely necessary in the interest of the estate.

It is also the duty of the nominated executor to care for all live stock and to see that no personal property is removed unless he removes it for better care and preservation. He should see that no property is lost or misappropriated. All personal property is as much in his care for protection and preservation before probate as after, but he has no authority to dispose of it except where the property is of a perishable nature. See § 223.

Executor charged with value of hothouse plants which he allowed to freeze. *Matter of Spears*, 10 Misc. Rep. 635, 66 N. Y. St. Repr. 215, 32 N. Y. Supp. 819; aff'd, 89 Hun, 49, 69 N. Y. St. Repr. 428, 35 N. Y. Supp. 35.

¶ 42 Concurrent Jurisdiction of Supreme and Surrogate's Court; Action for Probate.

Concurrent jurisdiction of the supreme court to take proof of wills.

While the Supreme Court has jurisdiction to take proof of wills, yet the general policy of this State is and has been to commit to the courts of probate the decision of questions arising upon the due execution of an alleged will.

The Supreme Court has in special cases undertaken to probate wills of personal property where there have been obstacles which would prevent the surrogate from passing upon the question, but in all other cases the Supreme Court has refused to exercise jurisdiction, unless the will has related to real property. *Delabarre v. McAlpin*, 71 App. Div. 591, 76 N. Y. Supp. 301; *Anderson v. Anderson*, 112 N. Y. 104, 113; *Higgins v. Union T. Co.*, 32 N. Y. St. Repr. 197; aff'd, 127 N. Y. 635.

While the enlarged jurisdiction granted to the Surrogates' Courts in 1914 does not deprive the Supreme Court of its jurisdiction to probate a will, there is now no right to institute a proceeding for probate in Surrogate's Court, and then bring an action in another court, and so have two trials of the valid-

ity of the will. Where the proceeding is begun in the Surrogate's Court that court will have, under the present law, exclusive jurisdiction of the subject matter and its determination will be final except upon appeal. The Supreme Court may, however, be chosen as the forum for the trial and the existing provisions for probate of a will by action will control.

When action to establish a will may be brought.

An action to procure a judgment, establishing a will, may be maintained by any person interested in the establishment thereof, in either of the following cases:

1. Where a will of real or personal property, or both, has been executed, in such a manner and under such circumstances, that it might, under the laws of the state, be admitted to probate in a surrogate's court; but the original will is in another state or country, under such circumstances that it cannot be obtained for that purpose; or has been lost or destroyed, by accident or design, before it was duly proved and recorded within the state.

2. Where a will of personal property made by a person who resided without the state at the time of the execution thereof, or at the time of his death, has been duly executed, according to the laws of the state or country in which it was executed, or in which the testator resided at the time of his death, and the case is not one where the will can be admitted to probate in a surrogate's court under the laws of the state.

§ 200, *Decedent Estate Law*. Former § 1861, *Code Civ. Pro*.

For proceedings to prove lost or destroyed will in Surrogate's Court. See ¶ 51.

This section does not abridge the right of the surrogate to take proof of wills under his general jurisdiction. *Matter of Delaplaine*, 45 Hun, 225, 9 N. Y. St. Repr. 786; aff'g, 8 N. Y. St. Repr. 757; *Hemmje v. Meinen*, 20 N. Y. Supp. 619.

A person is "interested" who is a legatee although his legacy may have been satisfied by a method provided in the will. *Donlon v. Kimball*, 61 App. Div. 31, 70 N. Y. Supp. 252.

This section does not permit probate of the will of a non-resident which has been duly probated in the State of his residence unless it can be proved that he was actually a resident of this State. *Clark v. Poor*, 73 Hun, 143, 25 N. Y. Supp. 908, 56 N. Y. St. Repr. 122; *Plant v. Harrison*, 36 Misc. Rep. 649, 74 N. Y. Supp. 411.

Judgment that will be established; construction.

If, in such an action, the facts necessary to establish the validity of the will, as prescribed in the last section, are satisfactorily proved, final judgment must be rendered, establishing the will accordingly. But where the will of a person, who was a resident of the state at the time of his death, is established as prescribed in the last section, the judgment establishing it does not affect the construction or validity of any provision contained therein; and such a question arising with respect to any provision, must be determined in the same action, or in another action or a special proceeding, as the case requires, as if the will was executed within the state.

§ 201, *Decedent Estate Law*. Former § 1862, *Code Civ. Pro*.

Judgment admitting the will to probate may send will to surrogate's court for further proceedings.

Where the parties to the action, who have appeared or have been duly summoned, include all the persons who would be necessary parties to a special proceeding in a surrogate's court, for the probate of the same will and the grant of letters thereupon, if the circumstances were such that it could have been proved in a surrogate's court; the final judgment, rendered as prescribed in the last section, must direct, that an exemplified copy thereof be transmitted to the surrogate having jurisdiction, and be recorded in his office; and that letters testamentary, or letters of administration with the will annexed, be issued thereupon from his court, in the same manner, and with like effect, as upon a will duly proved in that court.

§ 202, *Decedent Estate Law*. Former § 1863, *Code Civ. Pro*.

Contents of judgment; surrogate's duty.

A copy of the will so established, or, if it is lost or destroyed, the substance thereof, must be incorporated into a final judgment, rendered as prescribed in the last section; and the surrogate must record the same, and issue letters thereupon, as directed in the judgment.

§ 203, *Decedent Estate Law*. Former § 1864, *Code Civ. Pro*.

Proof in partition.

Under the present practice there cannot be a retrial of the validity of the execution of a will in a partition action. The decree of the Surrogate's Court is final upon that issue in an action for partition.

But if the validity of a will which has not been probated becomes an issue in a partition action, the trial may take place in that action.

The provisions for establishing a lost or destroyed will by at least two credible witnesses applies only to a proceeding

for probate in Surrogate's Court, and not in proving such a will in a partition action, where it may be proved by common-law evidence and by one witness, and the denial of probate in Surrogate's Court does not preclude the parties in the partition suit. *Harris v. Harris*, 26 N. Y. 433; revg. 36 Barb. 88.

An unprobated will may be proved in an action for partition where there is an allegation that the deceased died intestate, and then may be offered in evidence. *Whitney v. Whitney*, 171 N. Y. 176.

Powers of executors not suspended pending action in supreme court to try validity of will.

There is no express provision of statute which diminishes the powers of an executor or of the surrogate on the commencement of an action in the Supreme Court which involves the probate of a will.

The general power of the Supreme Court to preserve the fund and to guard its own prospective decree, by granting appropriate injunctions, has been exercised in such cases. *Matter of Hughes*, 41 Misc. Rep. 75, 83 N. Y. Supp. 646.

Improper disposition of the personal estate or of the real estate may be prevented by injunction on application to the Supreme Court. The receipts and disbursements of the executor must be accounted for in the usual way, no matter what is the result of the action. *Hawke v. Hawke*, 74 Hun, 370, 56 N. Y. St. Repr. 415, 26 N. Y. Supp. 803.

Receiver, as successor of surviving executor, etc.

Where the estate of a decedent has been brought under the jurisdiction of the supreme court, by an action for partition or distribution, or for the construction or establishment of a will, the court may, upon the death of the sole surviving executor, appoint a receiver of the estate, pending the action, upon such terms and conditions, and upon such notice to the parties interested, as the court directs, and upon such security, if any, as to the court seems proper. For the purpose of carrying into effect the judgment and orders of the court, in relation to the estate, a receiver so appointed is the successor in interest of the surviving executor; and has, subject to the direction of the court, the like power, as an administrator with the will annexed.

§ 210, *Decedent Estate Law*. Former § 1869, *Code Civ. Pro.*

CHAPTER XIII.

What Wills May be Proved in Surrogate's Court. Where and How Proceedings for Probate Should be Commenced.

- ¶ 43. What wills may be proved in surrogate's court.
- § 138. Wills executed by citizen domiciled abroad.
- ¶ 44. In which county proceeding for probate should be brought.
- § 139. Who may file petition, and its contents.
- ¶ 45. § 140. Who should be cited; contents of citation.
- ¶ 46. Appearance and intervention of interested person.
- ¶ 47. Probate proceeding must be concluded, not dismissed.

¶ 43 What Wills May be Proved in Surrogate's Court.

A will of real or personal property, executed as prescribed by the laws of the state, or a will of real or personal property executed without the state in the mode prescribed by the law, either of the place where executed or of the testator's domicile, provided such will is in writing and subscribed by the testator, may be admitted to probate in this state. § 23, *Decedent Estate Law*.

For many years our law did not permit probate of wills devising real property unless executed in accordance with the laws of this State. A radical change has been made in this section which now makes no distinction between wills of personal estate and wills of real estate as to manner of execution to entitle them to probate.

They may now be executed according to the laws of this State or according to the laws of the place where executed or of the place of domicile. Such a will must, however, be one in writing and signed by the testator.

It must, however, be remembered that the will so executed must be produced before the Surrogate's Court or a commissioner appointed by the court, and testimony taken as to its execution, which must be returned to and filed with the court.

Where the will cannot be produced it may be probated by action in the Supreme Court. § 200, *Dec. Est. Law, ante*.

Where there is a fatal defect in a will which appears clearly upon its face, which cannot be cured by averment or proof, the

surrogate is not required to enter upon formal proof of the instrument, but may reject it at once. *Hewitt v. Hewitt*, 5 Redf. 271.

A paper duly executed directed how the estate should be disposed of, but stated an intention to make a formal will — *held*, that the paper was entitled to probate as a will. *Matter of Beebe*, 6 Dem. 43, 19 N. Y. St. Repr. 833.

Will ineffective, or passing real estate only, but appointing an executor.

A paper duly executed as a will which disposes of real or personal property and appoints an executor, is entitled to probate although its provisions may have become ineffective and nothing may pass under it, or real estate only may be devised by it, and the executor is entitled to have letters testamentary issued to him and he is entitled to administer the estate. *Matter of Maccafil*, 57 Misc. Rep. 264; *aff'd*, 127 App. Div. 21, 111 N. Y. Supp. 315; *Matter of Bunce*, 6 Dem. 278, 15 N. Y. St. Repr. 415; *Matter of Murphy*, 144 N. Y. 557.

Effect of change of residence since execution of will.

The right to have a will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein, is not affected by a change of the testator's residence made since the execution of the will.

§ 24, *Decedent Estate Law*.

Application of §§ 23 and 24 to wills previously made.

The last two sections apply only to a will executed by a person dying after April 11, 1876, and they do not invalidate a will executed before that date, which would have been valid but for the enactment of sections 1 and 2 of chapter 118 of the Laws of 1876, except where such a will is revoked or altered, by a will which those sections rendered valid, or capable of being proved as prescribed in article first of title third of chapter eighteen of the Code of Civil Procedure.

§ 25, *Decedent Estate Law*.

It would seem that the force and effect of the above two restrictions have been largely taken away by the change in section 23, and in other statutes to which they refer, and especially by section 47 Decedents Estate Law. See ¶ 281.

Probate of wills of Indians residing upon a reservation.

The Surrogates' Courts of the State have no jurisdiction to probate the will of an Indian residing upon a State reservation. *Matter of Jack*, 52 Misc. Rep. 424, 102 N. Y. Supp. 383; *Dole v. Irish*, 2 Barb. 639.

The doctrine of these cases has been greatly weakened by some later cases. For a full discussion of the question of the jurisdiction of our courts over estates of Indians, see *Hatch v. Luckman*, 64 Misc. Rep. 508, 118 N. Y. Supp. 689; aff'd, 155 App. Div. 765, 140 N. Y. Supp. 1123.

The disposition of property by will is unknown among the Onondaga Indians. *George v. Pierce*, 85 Misc. Rep. 105, 148 N. Y. Supp. 230.

Probate of wills of citizens of the United States domiciled in the United Kingdom of Great Britain and Ireland.

The last will and testament of any person being a citizen of the United States, or, if female, whose father or husband previously shall have declared his intention to become such citizen, who shall have died, or hereafter shall die, while domiciled or resident within the United Kingdom of Great Britain and Ireland, or any of its dependencies, which shall affect property within this state and which shall have been duly proven within such foreign jurisdiction, and there admitted to probate, shall be admitted to probate in any county of this state wherein shall be any property affected thereby, upon filing in the office of the surrogate of such county, and there recording, a copy of such last will and testament, certified under the hand and seal of a consul-general of the United States resident within such foreign jurisdiction, together with the proofs of the said last will and testament, made and accepted within such foreign jurisdiction, certified in like manner. Letters testamentary on such last will and testament shall be issued to the persons named therein to be the executors and trustees, or either thereof, or to those of them who, prior to the issuance of such letters, by formal renunciation, duly acknowledged or proven, and duly certified, shall not have renounced the trust therein devolved upon them; provided, that before any such will shall be admitted to probate in any county of this state, the same proceedings shall be had in the surrogate's court of the proper county as are required by law upon the proof of the last will and testament of a resident of this state who shall have died therein; except that there need be cited upon such probate proceedings only the beneficiaries named in such will.

§ 138, *Sur. Ct. A.* Former § 2608, *Code Civ. Pro.*

It is a general rule that wills probated in foreign jurisdictions, and in fact in other States of the Union can not be probated in this State. See ¶ 48.

But with regard to wills executed by our citizens domiciled or resident in Great Britain and its dependencies, a special provision has been made that they may be probated upon properly certified copy of the will and the proceedings for probate in the country where probated.

¶ 44 Jurisdiction. In What County Proceeding to Probate a Will Should be Brought; Who May Bring It; Contents of Petition.

Jurisdiction of the court in any particular county depends first on residence of the testator in that county, as the proceeding must be brought in the county in which the testator resided, if he was a resident of the State. If not a resident of the State, jurisdiction depends upon the location of property, real or personal in that county. These requirements are considered under § 45, ¶¶ 17, 18.

Where the question arises as between domicile or residence in different States or different countries, different laws and different statutes may govern the administration of an estate, while as between residence in different counties within the same State the same rule of law must govern administration. Furthermore, the question arising as to the right of administration within different counties within the same State rests largely upon the question of convenience of administration. *Matter of Curtis*, 194 App. Div. 334, 185 N. Y. Supp. 507.

Who may propound will; contents of petition.

A petition for the probate of a will may be presented by:

Any person designated in the will as executor, devisee, legatee, testamentary trustee or guardian;

A creditor of the decedent, or any other person interested in the estate;

Any party to an action brought, or about to be brought, in which action the decedent, if living, would be a proper party.

The surrogate's court may direct the public administrator or county treasurer to present a petition if a will has been filed in the surrogate's office for over sixty days and no other person who is entitled to petition for its probate has done so.

Such petition in addition to the general allegations contained in section 51 of this act shall describe such will, and any other will of the same testator on

file in the surrogate's office, and set forth the names and post-office addresses, so far as they can be obtained with due diligence, of all the devisees, legatees and beneficiaries named in said will, or in any other will so filed.

§ 139, *Sur. Ct. A.* Former § 2609, *Code Civ. Pro.*

The amendment of 1920 provides for filing a petition by the public administrator or county treasurer.

This amendment may be useful in cases where the persons interested are absentees or unknown, and there is an estate to be conserved.

Where another will is on file that must be described in the petition so that both may be heard together.

What wills may be proved are specified in Decedent Estate Law, §§ 23-25, ¶ 43.

The will must be filed.

Where the will has not already been filed with the surrogate, it should be filed when the petition for its probate is presented.

As no copy of the will is required to be served upon any of the interested parties, a person who has been served with the citation should be able at once to inspect the will itself, and for such purpose it is necessary that it be filed in the surrogate's office. Where it is impossible to file a petition and issue a citation for probate within a reasonable time after the death of the testator, it is advisable to file the will before the petition is presented, as that will give notice of the existence of a will to the creditors and other persons interested and may obviate the useless proceeding for the appointment of an administrator, which is sometimes brought because the parties interested have no definite knowledge of the existence of a will. In New York and other large counties the proponent is required to furnish with the will a verified copy of the will.

An executor should petition.

While it is customary to expect the executor named in the will to present it for probate, if he fails to do so within a reasonable time the petition of any of the other persons

named in the section will be entertained, and when once acted upon and a citation issued the petition of the executor should not be received or another citation issued, but the petitioner should be allowed to conduct the proceedings to a close.

It is the duty of the executor to propound the will for probate. *Paxton v. Brogan*, 35 N. Y. St. Repr. 479, 12 N. Y. Supp. 563.

A creditor.

A person claiming to be a creditor may present a petition for probate. If it is denied that he is a creditor he must show facts which sustain his claim. *Gove v. Harris*, 4 Dem. 293.

A creditor who has made application for administration may bring proceedings to probate a will where it is alleged one exists. *Matter of Taggart*, 40 N. Y. St. Repr. 368, 16 N. Y. Supp. 514.

An infant.

An infant may make the petition for probate, and on the return of the citation, such infant then becoming a party to a proceeding, a special guardian may be appointed. *Matter of Watson*, 2 Dem. 642.

A person holding a power of attorney.

The petition may be presented by a person holding a proper power of attorney executed by a legatee or person interested. *Russell v. Hartt*, 87 N. Y. 19.

A person taking property passing by the will from a legatee or devisee.

Under the definition of a "person interested" as being one who is an assignee, grantee or otherwise (sec. 314, sub. 11, Sur. Ct. A.), a person may petition for probate who is vested with title to any property passing by the will by reason of the death of such legatee or devisee.

The petition. See also § 51, ¶ 25.

To the special allegations required by this section to be inserted in the petition should be added the general requirements specified in § 51, ¶ 25.

Where parties are unknown or there are unknown heirs-at-law and next of kin, §§ 54 to 58 should be consulted. ¶¶ 26-28.

The proceeding for the probate of a will is begun by the filing of a written petition duly verified and containing statements and allegations as to the following facts:

a. The name of the petitioner, his place of residence, and his interest in the estate of the deceased.

b. The date and place of death of the deceased and where he resided at the time of his death.

c. If he was not a resident of the county in which the application is made, a statement of jurisdictional facts which authorize the application in that county.

d. The date of the alleged last will, the names of the attesting witnesses, and whether or not such will relates to real or personal property or both.

The will may relate to real estate and so be proved as a will of real estate, even though the testator had no real estate at the time of his death.

e. A statement as to whether or not there is any other will or a codicil to said will and, if so, its date and the names of the attesting witnesses and the persons interested thereunder.

f. The name of the surviving husband or wife, if any, and

g. If the will relates to both real and personal estate, the names, residences, and ages of all the heirs-at-law and next of kin of the deceased.

h. If the will relates to personal property only and is offered as a will of personal property only, the names of the next of kin of the deceased.

i. If the will relates to real property only and is offered as a will of real property only, the names of all the heirs-at-law of the said deceased.

In most cases the same persons are both heirs-at-law and

next of kin, but where the relationship is remote they may not be both.

j. An allegation of no previous application for the probate of said will in any Surrogate's Court.

k. Prayer for the issue of citation to all necessary parties.

l. Prayer that the will be proved as a will of real property, or of personal property, or of both.

The surrogate may regard the oath taken to the petition as sufficient *prima facie* evidence of the jurisdictional facts therein alleged. If no issue as to such facts be raised the surrogate effectually decides that such facts are true and that decision gives him jurisdiction. *Bolton v. Schriever*, 135 N. Y. 65; *Van Gaasbeek v. Staples*, 85 App. Div. 271, 83 N. Y. Supp. 225.

Importance of correct names.

The necessity of obtaining absolutely correct names of the testator and all other parties interested is too often ignored. As all such names are indexed alphabetically in the records of the court the misspelling of a name may give it a place in the index or other records where it will be found and identified with much difficulty.

It often happens that the testator has money on deposit or has securities, and if there is any carelessness in the use of his name in the probate proceeding great difficulty may be experienced when the executor attempts to make collection of these assets.

Great care should also be exercised in ascertaining the true names of all parties interested, for it may become an important question at some future time whether the proper party has been cited in the proceeding.

Will may be admitted upon petition and waiver of citation.

Where all the persons interested are desirous of having the will probated, and sign and acknowledge waivers of issue and service of citation, probate may be granted upon the petition and such waivers without issue of citation, at any

time upon production of the subscribing witnesses before the surrogate or the probate clerk and the taking of their depositions. In New York and some other counties petition and waivers must be filed two days in advance of taking proof.

¶ 45 Who Should be Made Parties.

Who to be cited thereupon; contents of citation.

The following persons must be cited upon a petition, presented as prescribed in the last section:

If the will relates exclusively to real property, the husband or wife, if any, and all the heirs of the testator.

If the will relates exclusively to personal property, the husband or wife, if any, and all the next of kin of the testator.

If the will relates to both real and personal property, the husband or wife, if any, and all the heirs, and all the next of kin of the testator.

In every case, each person designated in the will as executor, testamentary trustee or guardian, and each person named as executor, testamentary trustee or guardian, or beneficiary in any other will of the same testator filed in the surrogate's office.

In addition to the general contents contained in sections 53 and 54 of this act, the citation must also set forth the name of the person by whom the will is propounded; whether the will relates exclusively to real property, or to personal property, or to both; and if the will is nuncupative, that fact.

§ 140, *Sur. Ct. A.* Former § 2610, *Code Civ. Pro.*

The next to the last paragraph of the section includes with the executor, a trustee or testamentary guardian, and all persons named in another will on file, as persons to be cited.

Who should be cited; special cases.

A nonresident alien brother of a deceased citizen, if an heir-at-law, entitled to citation. *Kilfoy v. Powers*, 3 Dem. 198.

An alleged adopted child should be cited so that the legality of the adoption may be determined by the proper authority. *Matter of Gregory*, 13 Misc.Rep. 363, 69 N. Y. St. Repr. 479, 35 N. Y. Supp. 105.

After-born child.

While the interest of an after-born child may not be affected by the probate of a will, and he therefore may have no right

to contest such will, yet the statute requires that all next of kin or heirs-at-law or both, should be cited, and therefore it is advisable to cite such after-born child.

Widow or widower of pre-deceased heir-at-law or next of kin.

Widow or widower of pre-deceased heir-at-law or next of kin need not be cited since such deceased person never had an interest in the property to which any marital right could attach.

Legatees and devisees.

Legatees and devisees who are not heirs-at-law or next of kin need not be cited in the first instance, since their rights are not taken away by the probate of a will. If objection is made to the probate, provision is made (§ 148) for a notice to be given to them so that they may protect their interests under the will. *Walsh v. Ryan*, 1 Bradf. 433.

Where a petition for probate of memoranda left with a will already probated is presented, the legatees named in said memoranda need not be cited. *Matter of Greene*, 2 Dem. 160; *S. C.*, *Dyer v. Erving*, 2 Dem. 160.

Where heirs-at-law and next of kin are unknown.

Because the widow or husband or a near friend does not know that the deceased had any heir-at-law or next of kin, it does not follow that a citation need not be issued and served upon such person by publication. It is unsafe to act upon the supposition that no such interested parties are in existence. See § 57, ¶ 28.

Presumption of death from long absence. See ¶ 17.

Upon the question of acquiring jurisdiction of absent persons it is not safe to indulge in any presumption of death.

Where the person has been absent for more than seven years under such conditions as to raise a presumption of death, the citation should be directed to such person, if living, and to the widow or husband, heirs-at-law, and next of kin, or

personal representative if any, if he be dead. *Dworsky v. Arndstein*, 29 App. Div. 274, 51 N. Y. Supp. 597.

Where a codicil is presented.

If the will has annexed to it a codicil which deprives any legatee or devisee of any right under the original will, it would seem that such legatee or devisee ought to have notice of the proceeding so that he may contest the validity of the codicil.

Where a party dies, the representatives should be substituted.

Where a proponent of a will who is a beneficiary dies pending probate, his executor may make an *ex parte* application to be made a party to the proceedings, and then upon notice may apply to be substituted as proponent and for a revival of the proceedings. *Matter of Govers*, 5 Dem. 40; *Merritt v. Jackson*, 2 Dem. 214.

Where a contestant dies during proceedings for probate leaving infant next of kin, the surrogate should bring in such infant parties and appoint a special guardian for them. *Russell v. Hartt*, 87 N. Y. 19.

In probate proceeding the surrogate, having acquired jurisdiction of all parties, is not divested of jurisdiction by the death of one of them, but the representatives of such party should be brought in. *Brick v. Brick*, 66 N. Y. 144.

Where all the parties to the probate proceeding have died, the proceeding has not abated, but may be revived by any interested party and a supplemental citation issued. *Lafferty v. Lafferty*, 5 Redf. 326.

Appearance by interested person who was not cited.

It is the almost universal practice not to cite persons who have duly filed waivers as allowed under section 41 Sur. Ct. A. (¶ 20), on the theory that a person who is competent and of full age may waive the process of the court by which jurisdiction of his person is obtained, and that the filing of such a waiver is equivalent to service of process upon him.

Notwithstanding such waiver the party may appear under section 41, although he need not ask to be made a party to the proceeding, for presumably he is already mentioned in the petition as a party.

Any persons interested who was not cited may appear and make himself a party to the proceeding for probate, because such persons are required to be made parties, or because it is the inherent duty and right of the court to allow all interested persons to become parties to a proceeding. Sections 51 and 140 require all interested persons to be made parties.

For the practice on the application to intervene and be made a party, see ¶ 46.

Notice to legatees and devisees not cited.

Section 148, ¶ 52, makes it necessary to give notice of the trial of objections to a will to all persons who are named as legatees or devisees in the will, and they have the right to appear and be made parties to the proceeding.

¶ 46 Character of Interest Which Entitles Person to Appear and be Made a Party.

The interest which gives a party not cited the right to intervene and oppose probate has been considered in *Matter of Davis* (182 N. Y. 468; aff'g, 45 Misc. Rep. 306 and 105 App. Div. 221). An interest resting on sentiment or sympathy, or on any basis other than the gain or loss of money or its equivalent, is not sufficient, but any one who would be deprived of property in the broad sense of the word, or who would become entitled to property by the probate of a will, is authorized to appear and be heard upon the subject. Conflict of jurisdiction and delay in administration may thus be avoided.

The practice in this State, so far as it has been established, is in accord with these views. Thus, intervention has been allowed by a legatee under a prior will, although he was neither an heir-at-law nor next of kin of the testator, *Terhune v.*

Brookfield, 1 Redf. 220; by the executors under a prior will, even when the parties beneficially interested had released their interest, *Matter of Greeley*, 15 Abb. Pr. (N. S.) 393; by a public administrator when the decedent left no known next of kin, and by the Attorney-General when he left no known heir-at-law, *Gombalt v. Public Administrator*, 4 Bradf. 226; and by a judgment creditor of a devisee under a will when there was a purported codicil which took away the devise, *Matter of Coryell*, 4 App. Div. 429, 39 N. Y. Supp. 508. In *Matter of Brown* (47 Hun, 360), it was held that the receiver of the property of a judgment debtor could not contest the probate of the will of the wife of the debtor, although if probate should be denied the debtor would come into property enough to pay his debts, but Judge Landon, in commenting on this case in *Matter of Coryell* (*supra*), pointedly said: "The difference between compelling a debtor to acquire property enough to satisfy his creditors, and disabling the creditor to protect the lien which he has already acquired upon his debtor's property, is apparent."

Father of testator not allowed to intervene on the ground that a child of testator, born out of wedlock in Connecticut, was legitimatized by the laws of Pennsylvania where the parents were married after a divorce obtained by the first wife against her husband. *Matter of Bunce*, 6 Dem. 278, 15 N. Y. St. Repr. 415.

The surrogate may determine whether a child born after making of the will is "unprovided for by any settlement," as a preliminary to deciding the standing of such child to contest probate. *Matter of Huiell*, 6 Dem. 352, 15 N. Y. St. Repr. 715.

One claiming the right to intervene upon the ground of interest under a prior will must show either such other paper was in existence when decedent died, or that it had been previously lost or without his procurement destroyed. *Hamersley v. Lockman*, 2 Dem. 524, 7 N. Y. St. Repr. 292.

It is the right and duty of the surrogate to try the question of interest, if it is raised, before allowing any person to con-

test a will, even where such person is named in the petition as an interested person. *Matter of Hamilton*, 76 Hun, 200, 57 N. Y. St. Repr. 810, 27 N. Y. Supp. 813; *Henry v. Henry*, 4 Dem. 253.

Where the person seeking to intervene and to oppose probate was a legatee to a greater amount than in a former will, it was held that the application should be denied as he had no interest to protect. *Matter of Hoyt*, 55 Misc. Rep. 159, 106 N. Y. Supp. 359; aff'd, 122 App. Div. 914, 107 N. Y. Supp. 1130.

Second cousins will not be allowed to intervene in a probate proceeding where there are living cousins constituting the nearest degree of relationship, and the will is to be proved as a will of personal estate only. *Matter of Polansky*, 90 Misc. Rep. 273, 154 N. Y. Supp. 669.

Intervening and presenting codicil by persons not cited.

Where on probate proceedings persons not cited produce a codicil, the surrogate should direct that it be filed and an application made for its probate, the application to be heard with that for the probate of the will. *Carle v. Underhill*, 3 Bradf. 101.

Probate of a will does not bind a person interested in a codicil thereto where such person was not a party to such proceeding and the codicil was not offered for probate. Such codicil may thereafter be probated in an independent proceeding. *Matter of Tilden's Will*, 56 App. Div. 277, 279, 67 N. Y. Supp. 879; aff'g, 32 Misc. Rep. 118, 66 N. Y. Supp. 175.

Legatees under a prior will whose interests have been cut off by a later will or by a codicil may intervene to protect their rights by contesting the later will or the codicil. *Walsh v. Ryan*, 1 Bradf. 433.

Surrogate may try issue of right to intervene.

Where, upon an application for the probate of a will, a woman sought to contest probate, claiming to be the common-law wife of the testator, it was held that the surrogate had the right first to determine the question as to whether the alleged

widow was in fact such, and had any status in court. *Matter of Hamilton*, 76 Hun, 200, 27 N. Y. Supp. 813. See also, to the same effect, *Matter of Peaslee*, 73 Hun, 113, 25 N. Y. Supp. 940; *Matter of Comins*, 9 App. Div. 492, 41 N. Y. Supp. 323.

The question of the right to intervene should be first tried, but it is not necessarily a separate proceeding. *Norton v. Lawrence*, 1 Redf. 473.

Until the applicant has been made a party to the proceeding by leave of the court he cannot make any motion or move in such proceeding. *Lafferty v. Lafferty*, 5 Redf. 326.

The court should determine as a preliminary issue the status of an alleged widow who seeks to make objection to probate. *In re Lord's Will*, 90 Misc. Rep. 222, 154 N. Y. Supp. 302. See 170 App. Div. 912.

Trial by jury.

The applicant is not entitled to a jury trial of the issue. *Matter of Bitter*, 154 N. Y. Supp. 975.

Declarations as to pedigree. See ¶ 23.

Declarations of the deceased and other members of the family as to the pedigree of one seeking to contest a will are competent upon the right of such person to contest. *Matter of Fail*, 56 Misc. Rep. 217, 107 N. Y. Supp. 224.

Effect of appeal.

An appeal by a person not a party to probate proceedings on the ground that he had a legal right to be made a party, which right was passed upon and denied by the surrogate, does not stay the proceedings for probate. *Matter of Evans' Will*, 33 Misc. Rep. 671, 68 N. Y. Supp. 937; aff'd, 58 App. Div. 502, 69 N. Y. Supp. 482.

¶ 47 Proceeding for Probate Cannot be Dismissed While Any Party Desires a Decision.

After the petition is filed with the surrogate and the proper parties have been cited and are before him, he has jurisdiction

of the subject matter and of the parties. It is a proceeding *in rem* to prove the will. All the parties can become actors therein. Any of them can contest and produce witnesses in opposition to the probate, and any of them can offer witnesses in support of the will and cross-examine the witnesses called in opposition thereto. In such a case, if all the parties cited, being of full age, should ask that the proceedings be dismissed, no one appearing in support of the will, it would be the duty of the surrogate to dismiss the proceeding. The same result could be produced if all the parties cited should formally admit that the will was not legally executed or that the testator was incompetent. But so long as any person cited is before the surrogate in support of the will, he has no right, upon the motion of any other party, arbitrarily to arrest or dismiss the proceeding. After the proceeding is once instituted, and the parties cited are before the surrogate, it is not solely the proceeding of the proponent. It is a proceeding in behalf of all the parties interested to prove the will. If the proponent should die, the proceeding would not abate. If he left successors to his interest, they would have to be brought in and be made parties to the proceeding as persons interested in the estate. If the proponent should refuse to introduce any evidence in support of the will, any other party could produce and examine the witnesses. *Matter of Lasak*, 131 N. Y. 624; *aff'g*, 57 Hun, 417.

When once an instrument purporting to be a will has been produced before the surrogate and parties interested have been summoned to attend its probate, it is no longer under the control of the persons who have propounded it. They cannot claim the right to withdraw it from the files, even though all persons interested consent to that course. *Hoyt v. Jackson*, 2 Dem. 443, 456, *folld*, 5 Dem. 426.

The will and such proofs as have been taken cannot be withdrawn from the court where the parties abandon the proceedings to probate a will. *Matter of Greeley's Will*, 15 Abb. Pr. (N. S.) 393.

Surrogate has power to allow a proponent to withdraw the will from probate and to discontinue the proceedings. *Heermans v. Hill*, 2 Hun, 409.

So long as any person cited is before the surrogate in support of the will he has no right, upon the motion of any other party, arbitrarily to arrest or dismiss the proceeding. *Matter of Lasak*, 131 N. Y. 624; aff'g, 57 Hun, 417, 32 N. Y. St. Repr. 955, 10 N. Y. Supp. 844, which aff'd, 23 Abb. N. C. 54, 7 N. Y. Supp. 2.

It is the right of all persons interested in the estate that the will shall be proved, and they cannot be deprived of that right by reason of any preceding act of the person named as executor. And, when the proper proof has been given, it is imperative on the surrogate that the instrument must be admitted and established as a will. *Paxton v. Brogan*, 26 Abb. N. C. 389, 35 N. Y. St. Repr. 479, 12 N. Y. Supp. 563. See also 10 N. Y. Supp. 303

A probate proceeding does not abate by the death of any party. A voluntary appearance in the proceeding by the legal representative of a deceased party confers jurisdiction to continue the proceeding. *In re Herrmann's Estate*, 91 Misc. Rep. 464, aff'd, 122 App. Div. 907, 219 N. Y. 565, 154 N. Y. Supp. 957.

Dismissal by special term.

The special term should not dismiss a proceeding sent to Supreme Court for jury trial. It is not in the nature of the case that the proponent must bring the case on or introduce the evidence. Any party may do it, and the court should not dismiss for lack of prosecution. *Matter of Miller*, 141 App. Div. 349.

CHAPTER XIV.

Production of the Will; Examination of Subscribing Witnesses Before the Surrogate or by Commission; Proceeding to Prove a Lost or Destroyed Will.

¶ 48. § 141. Examination of subscribing witnesses.

§ 73. Before the surrogate of original jurisdiction.

§ 74. Before another surrogate or a referee.

Production of will before the officer taking deposition.

¶ 49, § 142. Absent and incapable subscribing witnesses; dispensing with testimony.

¶ 50. Depositions of witness out of the state.

¶ 51. § 143. How lost or destroyed will may be proved.

¶ 48 Production and Examination of Witnesses to the Will.**Witnesses to be examined; proof required.**

Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined, if so many are within the state, and competent and able to testify. Before a nuncupative will is admitted to probate, its execution and the tenor thereof must be proved by at least two witnesses. The proofs must be reduced to writing. Any party to the proceeding may request the oral examination of the subscribing witnesses to the will and may examine such witnesses and any other witness produced by the proponent before the surrogate, without first filing objections to the probate of such will. § 141, *Sur. Ct. A. Former § 2611, Code Civ. Pro.*

A new sentence has been inserted establishing the present practice of allowing an examination of witnesses without filing objections, but limiting such right to the witnesses which are produced by proponent.

Testimony of witness; how taken. See ¶ 32.

Where it appears to the satisfaction of the surrogate, that the testimony of a witness is material and necessary, the surrogate may, in his discretion, proceed to the place where the witness is, and there, as in open court, take his examination. Such notice of the time and place of taking the examination, as the surrogate prescribes, must be given, by the party applying therefor. § 73, *Sur. Ct. A. Former § 2543, Code Civ. Pro.*

Idem; by the surrogate of another county.

Where the surrogate has good reason to believe that a subscribing or a material witness who is in another county of the state cannot conveniently attend before him, and no issue is pending therein, he may make an order, directing that the witness be examined before the surrogate of the county in which he is; specifying by an order the nature and manner of the examination. A copy of the order must be transmitted by him to the surrogate designated in the order, together with the original will, where the testimony relates to the execution of a written will. The examination may be taken by one of the clerks described in section 32 of this act. The examination, after it is reduced to writing and subscribed by the witness or otherwise duly authenticated, together with a statement of the proceedings upon the execution of the order, must be certified by the surrogate or clerk taking the examination, attested by the seal of his court, and returned without delay, with the original will, if any, to the surrogate who directed the examination, who must file the same in his office. A surrogate may appoint a referee to take the testimony, who shall report the same to the surrogate who makes the appointment. An examination so taken has the same effect as if it was taken by commission.

§ 74, *Sur. Ct. A.* Former § 2544, *Code Civ. Pro.*

Will must be produced before surrogate or other officer who takes deposition.

The original will of an inhabitant of this State must be produced before the surrogate and filed in his office. *Matter of Law*, 80 App. Div. 73.

Where the deposition of a sick or infirm witness is taken before the surrogate of another county the will must be sent to such surrogate and returned with the deposition.

If the testimony be taken out of the State by commission the will must accompany the commission and be returned with it. (¶ 50.)

Where the proceeding is to probate a foreign will which remains on file in another country, if the will and the witnesses can be produced before the commissioner the will may be probated, otherwise not. *Matter of Cameron*, 47 App. Div. 120, 62 N. Y. Supp. 187; aff'd, 166 N. Y. 610; *Matter of Weston*, 60 Misc. Rep. 275, 113 N. Y. Supp. 619; aff'd, 131 App. Div. 901, 115 N. Y. Supp. 1149.

Where the probate of a later will is alleged to have been had in another State, but such will can not be obtained for production or probate in this State to defeat the probate of a

prior will, a commission should issue. *In re Horton's Will*, 163 App. Div. 212, 148 N. Y. Supp. 18.

Duplicate will.

The duplicate should be produced before the surrogate or the absent one accounted for, since the act of revoking one will revoke both. (¶ 39.)

Probate of foreign will probated in another country. See ¶ 43.

A foreign will duly probated in another country can not be probated in this State. *Matter of Connell*, 221 N. Y. 190. The proper proceeding if there is personal estate here and administration is necessary as to it, is to obtain ancillary letters. See ¶ 111.

Probate is not granted upon the filing of the exemplified record of a foreign probate. *Matter of Delaplaine*, 45 Hun, 225. *Prima facie* title to real estate may be made in that manner, but no probate is allowed thereon.

Will not produced cannot be probated by proving codicil. See ¶ 65.

Where a will cannot be produced, probate of it cannot be obtained by proving a codicil thereto. *Matter of Andrews*, 43 App. Div. 394, 401; *aff'd*, 162 N. Y. 1; *Matter of O'Neil*, 91 N. Y. 516, 523; *Cook v. White*, 43 App. Div. 388, 393; *aff'd*, 167 N. Y. 588; *Matter of Carll*, 38 Misc. Rep. 471, 474-5; *Matter of Emmons*, 110 App. Div. 701, 96 N. Y. Supp. 506. *Brown v. Clark*, 77 N. Y. 369.

Apparent mutilation. See ¶ 39.

When a will is presented for probate in such a physical condition that it is apparent that it is not as it originally was, the surrogate should require proof as to the matter from the proponent as he is required to be satisfied that the will has not been revoked before he can admit it to probate. *Matter of Francis*, 73 Misc. Rep. 148, 132 N. Y. Supp. 695.

A will not revoked by mutilation may be admitted as to the remainder and in accordance with the proof as to the missing

provisions. *In re Kent's Will*, 89 Misc. Rep. 16, 152 N. Y. Supp. 557. See S. C. 169 App. Div. 388.

Examination of witnesses.

The surrogate usually provides a blank, "Deposition of witnesses," to be used and this deposition is signed by both witnesses and sworn to before the surrogate; a separate deposition for each witness is used in some offices. Where one witness is dead or is not within the State a form for the "deposition of a single witness" is used, which, in addition to the usual statements, contains a statement as to the death or absence from the State of the other witness.

The manner of taking the testimony of a witness within the State who is disabled from attending before the surrogate is prescribed in sections 73, 74, of the Surrogates' Court Act. See ¶ 32.

Oral examination of witnesses; laying foundation for filing objections to probate.

Upon the return of the citation any party has the right to require the oral examination of the subscribing witnesses, even though he does not file objections to the probate of the will.

Any person who would be deprived of his natural right of inheritance or to share in the distribution of personal property by the probate of a will should be allowed great liberty in the examination of the witnesses, through whose testimony he may be deprived of such natural rights.

It is customary to take the formal deposition of the witnesses on the provided blanks and to consider such deposition the direct testimony of the witnesses, and then to permit any party interested full and free cross-examination of such witnesses.

But if any party objects to the written deposition being taken and used as the direct examination, the surrogate should require the proponent to examine the subscribing witnesses orally.

Upon the completion of such cross-examination, if the parties announce that they do not wish to file objections, the will is admitted to probate upon the formal deposition.

Before a will is admitted to probate at least two of the subscribing witnesses must be called and examined. It is not an "examination" of a subscribing witness to ask him to identify his signature on a will, and stop there.

Such an "examination" of the second witness is not sufficient compliance with the statute to entitle the will to probate. *In re Huber*, 181 App. Div. 635, 168 N. Y. Supp. 890.

A general guardian who has been allowed to become a party to the proceeding may examine the subscribing witnesses. *In re Woerz*, 174 App. Div. 430, 161 N. Y. Supp. 209.

Examination of petitioner.

On a preliminary examination of witnesses before objections are filed, the petitioner for probate can not be called and examined by the respondents. *In re Briggs*, 180 App. Div. 843, 168 N. Y. Supp. 382.

There is much to be said against this position being a sound one. It is based upon the theory that the petitioner is not a witness produced by the proponent (see sec. 141), but still the facts stated in the petition are allegations upon which the court has acted and which it has received as evidence, and which are considered as true until controverted.

The petition is considered evidence of the jurisdictional statements, the relationship, the allegation that the will produced is the last in date, that there is no codicil and other matters.

If the statements are put in issue by answer, the petitioner should be produced to make proof of them and should be subject to cross-examination.

¶ 49 Absent and Incapable Witnesses; Dispensing With Testimony; Sufficient Proof.

Absent, etc., witnesses to be accounted for; dispensing with testimony; commission; proof of handwriting.

The death, absence from the state, or incompetency by reason of lunacy, or otherwise of a subscribing witness required to be examined as prescribed in this or the last section, or the fact that such witness cannot, with due diligence, be found within the state, or cannot be examined by reason of his physical or mental condition may be shown by affidavit or other competent evidence, and when so shown to the satisfaction of the surrogate, the surrogate may by an order entered in the minutes or recited in the decree dispense with his testimony; or in a case where such witness is absent from the state and it is shown that his testimony can be obtained with reasonable diligence, the surrogate may, in his discretion, and shall upon the demand of any party, require his testimony to be taken by commission. Where the testimony of a subscribing witness has been dispensed with as provided in this section, and one subscribing witness has been examined, the will may be admitted to probate upon the testimony of such subscribing witness alone.

If all the subscribing witnesses to a written will be dead, or incompetent by reason of lunacy or otherwise, to testify, or unable to testify, or are absent from the state and their testimony has been dispensed with as provided in this section, or if a subscribing witness has forgotten the occurrence, or testifies against the execution of the will, or was not present with the other witness at the execution of the will; the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action.

§ 142, *Sur. Ct. A.* § 2612, *Code Civ. Pro.*

Where a witness cannot be produced the reason must be shown, and if it is one of the reasons given in this section an order may be entered dispensing with the testimony. Where one witness can be produced, it is provided that his testimony may be sufficient proof, but when neither can be produced there must be proof of handwriting.

Dispensing with testimony.

While the production and examination of a witness in certain cases before the surrogate may be dispensed with as provided in section 142, his testimony cannot be dispensed with except where there is proof by affidavit or other competent evidence:

a. Of his death.

b. That he cannot with due diligence be found within the State.

c. Of his incompetency by lunacy or otherwise.

If any witness is absent from the State, incompetent, or unable to testify, his production before the surrogate is dispensed with, but it does not follow that his testimony is thereby dispensed with, for that may and in many instances should be taken by commission.

While the law permits the surrogate to dispense with the taking of the testimony of a witness who is absent from the State, yet it is not in every such case that the surrogate ought to allow probate without the testimony of one or more of such absent witnesses.

The testimony of one or more of such absent witnesses can usually be taken by commission with very little trouble and expense, or the absent witness may voluntarily come into court, and where it is practicable to do that, such testimony ought not to be dispensed with.

Effort to find witness.

A petition or affidavit stating only that the whereabouts of a witness are unknown is not sufficient to authorize the surrogate to dispense with the testimony of such witness. Diligent and careful inquiry should be shown, and the facts should be fully set up so that the surrogate may determine judicially that the witness is not within the State, or is dead, or after due search cannot be found within the State.

Presumption of death of witness. See ¶ 17.

After an absence of seven years a witness may be presumed to be dead and his production dispensed with. *Matter of Oliver*, 13 Misc. Rep. 466, 68 N. Y. St. Repr. 741, 34 N. Y. Supp. 706.

Proof of death of witness.

Certificate of State Department of Health competent proof.

Public Health Law, section 5, Civ. Prac. A., §§ 382, 329.

Public Officers Law, §§ 9, 66. *Matter of Francis*, 73 Misc. Rep. 148, 132 N. Y. Supp. 695.

Taking testimony where one witness cannot be produced.

Where one of the subscribing witnesses is dead or incompetent or is absent from the State, the other subscribing witness being produced before the surrogate makes a deposition, usually termed the deposition of a single witness, in which such witness testifies to the genuineness of the handwriting of the testator and of the other subscribing witness and states that such subscribing witness is dead, or incompetent or absent from the State.

The affidavit or deposition should be more in detail concerning the time, place, and manner of execution of the will.

Upon this deposition of the single witness in such cases the will may be admitted to probate.

Proof of handwriting where presence and testimony of a witness is dispensed with, or the witness has forgotten the occurrence or denies it.

Where both subscribing witnesses are dead or incompetent, or both of such witnesses are absent from the State under such circumstances that a commission is not directed to take their testimony, the will may be proved upon evidence of any persons who can testify to the genuineness of the signatures of the testator and of the subscribing witnesses and also to such other circumstances as would be sufficient to prove the will upon the trial of an action.

While such proof may consist of the oral examination of such witnesses as to the signatures, the better practice is to embody such examination into an affidavit and present such witnesses and such affidavits to the surrogate who will then swear the witnesses to such affidavits in the usual form, and the affidavits so taken and filed will take the place of the usual deposition of the original witnesses.

Proof of other facts.

There must be evidence of the genuineness of the signature of the witnesses and of the testator. One good witness may make sufficient proof as to the three signatures. There should in such cases be other proof of extrinsic facts, such as the custody and control of the will, the place where it was found, declarations of the deceased concerning the existence of a will, proof as to the handwriting of the will itself, and if the person who wrote it cannot be produced, the reason therefor. *Matter of Bogert*, 6 Civ. Pro. 128; aff'g, 67 How. 313, 4 Civ. Pro. 441.

Proof of handwriting.

It appears that there are three methods by which a witness may be qualified to speak as to handwriting to be proved:

First. By having seen the party write.

Second. By having seen letters or documents in the handwriting of the party whose signature is sought to be proved, having personally communicated with him respecting them, or acted upon them as his, the party having known and acquiesced in such act, or by such adoption of them as induces a reasonable presumption of their being his own writing.

Third. By comparison of handwritings by an expert.

Matter of Burbank, 104 App. Div. 312; aff'd, 185 N. Y. 559.

By whom proof may be made.

Usually proof of handwriting can be made by disinterested persons who have done business with the testator and know his handwriting, and also know the witnesses to the will and are acquainted with their handwriting.

Evidence of the custody and control of the will and other general facts must usually be sought for among persons more or less interested in the estate, and possibly interested under the will itself.

There is no rule or reason why any or all of these facts can not be shown by interested persons, in the absence of a contest and an objection as to their competency.

Neither are such witnesses included among those who forfeit their legacies by giving testimony necessary to prove a will mentioned in section 27 of the Decedent Estate Law (¶ 283), since those witnesses must be subscribing witnesses.

¶ 50 Depositions Taken Without the State for Use Within the State. See ¶ 32.

Since former section 2620 Code Civ. Pro. was amended in 1888, several cases holding that the testimony of an absent subscribing witness, whose testimony could be taken by commission, was necessary before probate could be granted, apparently no longer apply under the authority of *Matter of Clark* (75 Hun, 471, 57 N. Y. St. Repr. 339). Those cases are *Graber v. Haaz* (2 Dem. 216); *Matter of Masters* (1 Civ. Pro. 459).

Duty of executor to apply.

It is the duty of the executor to furnish the court with the evidence in a proceeding for probate, and, therefore, he should apply for a commission when necessary. *Matter of Scott*, 80 App. Div. 369, 81 N. Y. Supp. 29.

Commission to foreign country; production of will.

A surrogate may appoint a commission to take the testimony of witnesses in a foreign country, and the production of the will before them is equivalent to its production in court. *Russell v. Hartt*, 87 N. Y. 19. See also 46 N. Y. St. Repr. 362.

A foreign will may be probated here by the production of the will and the witness before a commission. *Russell v. Hartt*, 87 N. Y. 19; *Matter of Cameron*, 47 App. Div. 120, 62 N. Y. Supp. 187; aff'd, 166 N. Y. 610; *Matter of Delaplaine*, 45 Hun, 225, 9 N. Y. St. Repr. 786; aff'g, 8 id. 757.

Where the will has been probated in one State and remains there, on application to probate it in this State, one witness residing here and the other in New Jersey, no commission can issue as the will cannot be produced before the commissioner.

Matter of Weston, 60 Misc. Rep. 275, 113 N. Y. Supp. 619; aff'd, 131 App. Div. 901, 115 N. Y. Supp. 1149. *Matter of Law*, 80 App. Div. 73.

The practice regarding taking testimony by commission has been changed by the Civil Practice Act and the Rules of Practice. Testimony may now be taken under a notice unless objection is made, in which case a motion is made at special term to vacate or modify the notice. See Civil Practice Act, § 288 *et seq.* and Rules of Civil Practice, § 120 *et seq.*

The former provision that an open commission can not be used when an infant or incompetent is a party is not incorporated in the new practice. The commission may be upon interrogatories or open or partly both.

That the witness or the testimony may be incompetent is no ground for denying the application. *Trowbridge v. Townsend*, 79 Misc. Rep. 65, 140 N. Y. Supp. 503; *Matter of Smith*, 79 Misc. Rep. 77, 139 N. Y. Supp. 522.

An application for a commission to take testimony of witnesses out of the State should be granted if the affidavits show that the testimony to be taken is material to the party and if the application is made in good faith. The surrogate should not deny such application because not made before a certain time fixed by him. *Matter of Shannon*, 180 App. Div. 214, 167 N. Y. Supp. 472.

Settlement of interrogatories. See Rules of Civil Practice, § 120 *et seq.*

See *Matter of Smith*, 80 Misc. Rep. 628, 142 N. Y. Supp. 151.

Testimony to be filed but not recorded.

Where in any matter before the surrogate or in a surrogate's court the testimony of any witness shall be taken by or on commission, the same, together with the commission on which it is taken, shall be duly filed in the office of the surrogate but need not be recorded.

§ 77, *Sur. Ct. A. Former* § 2547, *Code Civ. Pro.*

¶ 51 How Lost or Destroyed Will May be Proved.

Proof of lost or destroyed will.

A lost or destroyed will can be admitted to probate in a surrogate's court, but only in a case the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime; and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness.

§ 143, *Sur. Ct. A.* Former § 1865, *Code Civ. Pro.* and
§ 2613, *Code Civ. Pro.* combined.

Proof of lost or destroyed will by action. See ¶ 42.

Under the statute a lost or destroyed will can be admitted to probate in a Surrogate's Court only in a case where a judgment establishing a will could be rendered by the Supreme Court.

The petitioner must prove either that the will and codicil presented for probate existed at the time of testator's death or had been fraudulently destroyed in his lifetime.

It must be shown that the will was executed in such a manner and under such circumstances that it might under the laws of the State be admitted to probate in a Surrogate's Court. That the will has been lost or destroyed by accident or design before it was duly proved and recorded within the State.

This statute is not designed to permit probate of a will destroyed by cancellation or some other act which leaves the disposing portion of the will in existence. *Matter of Hughes*, 61 Misc. Rep. 207, 114 N. Y. Supp. 929.

Declaration of deceased.

Declarations of the deceased tending to show that he intended to dispose of his property by will are inadmissible to prove the existence of the will at the date of death. *Matter of Kennedy*, 167 N. Y. 163; aff'g, 53 App. Div. 105, 65 N. Y. Supp. 879; aff'g, 30 Misc. Rep. 1, 62 N. Y. Supp. 1011.

Declarations of the deceased as to the contents of his will are competent in a proceeding to prove it as a lost will, but are not equivalent to the testimony of two witnesses required

by statute. Probate denied. *Everitt v. Everitt*, 41 Barb. 385; dist'g, *Hatch v. Sigman*, 1 Dem. 519.

Declarations of a testatrix to the effect that she believed the will to be still in the custody in which she had placed it, and that it was a valid and unrevoked instrument, are competent to rebut any inference of revocation arising from its loss. *Matter of Cosgrove*, 31 Misc. Rep. 422, 65 N. Y. Supp. 570.

Fraudulent destruction.

Proof that relatives had access to the house and were there more or less during the last seven months since the will was last seen does not establish fraudulent destruction. *Collyer v. Collyer*, 110 N. Y. 481.

The burden of proof is upon proponent to show fraudulent destruction. *Perry v. Perry*, 21 N. Y. Supp. 133, 49 N. Y. St. Repr. 291.

Within the meaning of the statutes respecting the establishment or probate of a will lost or destroyed, a destroyed will must be rejected, unless the destruction was fraudulent. *Timon v. Claffy*, 45 Barb. 438; *Matter of De Groot*, 9 N. Y. Supp. 471, 18 Civ. Pro. 102; *Early v. Early*, 5 Redf. 376; *Matter of Reiffeld*, 36 Misc. Rep. 472. It is also true that a defacement which was done at the testator's direction could not be fraudulent in the ordinary acceptance of the word. *Matter of Hughes*, 61 Misc. Rep. 207.

Presumption and evidence of revocation. See ¶ 39.

Proof of due execution of a will affords no presumption that it was in existence at the death of testator.

Where it is shown that after a careful search among the papers and effects of the deceased no will could be found, the presumption arises that the decedent himself destroyed the will for the purpose of revoking it. *Matter of Kennedy*, 167 N. Y. 163; *Collyer v. Collyer*, 110 id. 481; *Matter of Barnes*, 70 App. Div. 523, 75 N. Y. Supp. 373.

“The burden of overcoming this presumption rested with the petitioner. It was not sufficient to show that some one of

the relatives had an opportunity to destroy it. The petitioner should have gone further and shown by facts and circumstances that the will was actually lost or destroyed. The fact that the testator's daughter, who was with him during his last illness, and whose interest was adverse to the will, refused to allow her brother to examine the papers in the testator's bureau drawer a short time before his death is a suspicious circumstance; it is not sufficient evidence, however, of the existence of the will at the time of testator's death, or of a fraudulent destruction of it during his lifetime." *Matter of Barnes*, 70 App. Div. 523, 75 N. Y. Supp. 373; *Matter of Ascheim*, 75 Misc. Rep. 434, 135 N. Y. Supp. 515.

Proof that a will was given to a custodian to keep and by him locked in a trunk, but was not there when searched for after testator's death, is sufficient evidence of its legal existence at testator's death. *Schultz v. Schultz*, 35 N. Y. 653.

What not sufficient proof of loss of will as against presumption of revocation. *Knapp v. Knapp*, 10 N. Y. 276.

A will lost or destroyed since the death of testator, or by some other person before his death may be probated. *In re Gethin*, 97 Misc. Rep. 561, 163 N. Y. Supp. 398.

Proof of contents.

The fact that two witnesses cannot prove who was named as executor does not require denial of probate. *Early v. Early*, 5 Redf. 376.

Two witnesses must testify to all the provisions — not two as to some and two as to others. A stipulation as to contents by a counsel for the respective parties is not sufficient. *Matter of Ruser*, 6 Dem. 31, 19 N. Y. St. Repr. 791.

Where the witnesses do not agree as to contents nor declare that they remember substantially all the contents, there is not sufficient proof. *Matter of Purdy*, 46 App. Div. 33, 61 N. Y. Supp. 430; aff'g, 25 Misc. Rep. 458, 55 N. Y. Supp. 644.

The substance of the will must be clearly proved by two witnesses, but the exact language need not be proved. Probate

refused. *McNally v. Brown*, 5 Redf. 372; *Matter of Waldron*, 19 Misc. Rep. 333, 44 N. Y. Supp. 353.

Where both witnesses to the will are dead and there is no proof of their handwriting showing that they signed the lost will, it cannot be proved. *Matter of Halstead*, 51 Misc. Rep. 542, 101 N. Y. Supp. 971.

Evidence of attorney, not a subscribing witness.

An attorney who prepared the will, but did not act as a witness is prohibited from disclosing the contents thereof. See ¶ 55. *Matter of Cunnion*, 61 Misc. Rep. 546; aff'd, 135 App. Div. 864; aff'd, 201 N. Y. 123.

CHAPTER XV.

Filing Objections to Probate; Giving Notice to Beneficiaries; Proceedings Upon Jury Trial. Competency of Witnesses.

¶ 52. § 147. Who may file objections; demand for trial by jury.

General objections.

Duty of executor in case objections are filed.

¶ 53. § 148. Notice to beneficiaries.

§ 149. Trial of objections before the court and jury, or before the court alone.

¶ 54. Competency of witness under § 347, Civ. Prac. Act.

Competency of legatee or devisee; release of interest.

¶ 55. § 352. Competency of physician, nurse, clergyman or lawyer.

§ 345. Waiver of privilege and of incompetency.

¶ 52 Filing Objections to Probate and Giving Notice Thereof.

Who may file objections to the probate of an alleged will; jury trial.

Any person interested in the event as devisee, legatee or otherwise, in a will or codicil offered for probate; or interested as heir-at-law, next of kin, or otherwise, in any property, any portion of which is disposed of or affected, or any portion of which is attempted to be disposed of or affected, by a will or codicil offered for probate; or is interested as devisee, legatee, executor, testamentary trustee or guardian in any other will or codicil alleged to have been made by the same testator and not duly revoked by him; may file objections to any will or codicil so offered for probate.

Such objections must be filed at or before the close of the testimony taken before the surrogate on behalf of the proponent, or at such subsequent time as the surrogate may direct, and if a jury trial of any issue is desired the same shall be demanded in the objections.

§ 147, *Sur. Ct. A.* Former § 2617, *Code Civ. Pro.*

Any person interested in the event, as devisee or legatee, may file objections, as well as heirs-at-law and next of kin. Any person interested in any other will or codicil alleged to have been made by the same testator may now file objections. The petition for probate (§ 139, ¶ 44) is required to refer to such a will, and the persons interested are required to be cited.

Notice in section 141, ¶ 48, provision for oral or cross-examination of witnesses for the purpose of laying the foundation for objections.

Demand for a trial by jury must be made in the objections filed or the same will be deemed to be waived.

The right to a jury trial given by Const., art. 1, section 2, may be waived, not only by the methods mentioned in the Surrogate's Court Act and Civil Practice Act, but also by failing, in a probate proceeding, to demand the same in the objections filed or at such subsequent time as the surrogate may direct. *Re Carnright*, 180 App. Div. 21, 167 N. Y. Supp. 438. See also ¶ 31.

Motion for leave to file objections to probate.

A motion for leave to file objections to probate by a sole heir and next of kin was granted, although made late in the proceedings. *In re Juengst*, 192 A. D. 917, 183 N. Y. Supp. 85.

Filing objections to probate.

Upon the return day of the citation or after the oral examination of the subscribing witnesses any party may file the formal objections to the probate of the will.

The objections should be in writing and verified.

The objections should allege that one or more of the necessary requirements for the valid execution of a will had not been complied with or that the testator when he attempted to make such will was not of sound and disposing mind or was then subject to undue influence, duress, or other control, so that the alleged will was not his will but the will of another.

Objections to probate in ordinary cases.

That the said instrument is not the last will and testament of said deceased.

That said instrument was not duly executed as a will is required to be executed.

That said deceased was not at the time said paper was signed of sound mind and memory and capable of making a will.

That the execution of said paper was obtained by fraud and undue influence.

Who may file objections to probate.

Objections may be filed by any party to the proceeding who has an interest in the estate and is opposed to the probate of the will, or who is interested in a codicil thereto or in another alleged will.

An illegitimate child is entitled to oppose probate of his mother's will as he would be entitled to his mother's estate in case of intestacy. *Matter of Bunce*, 6 Dem. 278, 15 N. Y. St. Repr. 415.

The wife of an heir-at-law, cannot contest because of her possible dower interest if the will should be defeated. *Matter of Rollwagen*, 48 How. 103.

Alleged widow.

An interlocutory order denying alimony in a separation action on the ground that the marriage was void, is not a bar to filing objections to probate by the alleged widow. *Matter of Mostobsky*, 90 Misc. Rep. 549, 154 N. Y. Supp. 927.

A legatee who is not an heir-at-law or next of kin.

"Interested in the event" has been construed to exclude a mere legatee who is not an heir-at-law or next of kin, from filing objections. *Matter of Nelson*, 89 Misc. Rep. 25.

Heirs of husband or wife taking under section 91, Decedent Estate Law.

The heirs of a husband or wife taking real property by virtue of the statute, section 91, Decedent Estate Law, are not entitled to contest probate as that statute does not create "heirs," but is considered as a gift of the title from the State which would take it by escheat. *Matter of Leslie*, 156 N. Y. Supp. 346, 92 Misc. Rep. 663, 175 App. Div. 108, 161 N. Y. Supp. 790.

Executor named in prior will.

The executor named in a will may oppose the probate of another will offered. *Matter of Greeley's Will*, 15 Abb. Pr. (N.

S.) 393; *Matter of Mooney*, 73 Misc. Rep. 315, 132 N. Y. Supp. 705.

After-born child. See ¶ 446.

Where a will does not provide for a child born after its execution, the rights of such child are not affected by the will, and such child has no standing in court to contest the will on the usual grounds. However the child may appear and have a construction of the will as to whether or not he is provided for by the will or otherwise, and upon that question being determined, may contest the will if it is held that he has been so provided for. *Matter of Gall*, 5 Dem. 374, 7 N. Y. St. Repr. 760; *Matter of Huiell*, 6 Dem. 352; *Matter of Bunce*, 6 Dem. 278, 15 N. Y. St. Repr. 415.

Can the State contest a will?

Mr. Surrogate Fowler *In re Smart's Will*, 145 N. Y. Supp. 838, raises, but does not decide, the question whether where the State claims that an estate escheats, it can be heard to contest the probate of a will.

An early case, *Gombault v. Pub. Adm.*, 4 Bradf. 226, allowed the Public Administrator and the Attorney-General to make a contest.

Duty of executor in case of contest.

When a person who is named as executor in such a paper offers it for probate and is met with a contest, he has before him two alternatives, either of which he may adopt. He may cast the burden of the contest upon those who are to be benefited by the probate of the paper, or he may assume the burden himself. If he pursues the latter course he must be deemed to act with knowledge of the well-established legal rule that even a *de jure* executor cannot bind the estate which he represents by any contract of his own making, and that any liability which he incurs or expenditure which he makes under such a contract, is regarded as his personal obligation until it has been allowed to him upon the probate, or upon the judicial

settlement of his accounts. *Austin v. Muro*, 47 N. Y. 360; *Ferrin v. Myrick*, 41 id. 315; *Matter of Van Slooten v. Dodge*, 145 id. 327; *Parker v. Day*, 155 id. 383; *O'Brien v. Jackson*, 167 id. 31; *Dodd v. Anderson*, 197 id. 466.

The present rule is not the same as when the above decisions were made, for then there was no discretion in the surrogate to allow such an executor his expenses, as there is now under § 278, ¶ 153.

Yet these decisions are just as applicable now as heretofore in many cases. If the executor assumes the burden of meeting the contest, he should so act with some knowledge that he has sufficient evidence to make a strong case for the will upon the trial, for unless he does make such a case, the surrogate may properly exercise his discretion not to allow the expenses which he incurs. If a contest is threatened the executor ought to remember that he has been selected by the testator to stand in his place in the distribution of his property, and he should not weakly abandon the probate of the will, and throw the burden upon persons who perhaps are poorly fitted to protect their rights. It is to prevent such a condition arising that the law now gives the surrogate wide discretion to direct that an executor be reimbursed for his expenses, in case of defeat.

Notice to legatees and devisees of objections filed.

Whenever objections are filed to the probate of a will, the proponent shall file the notice specified in section 146 and serve the same on each of the parties therein named, and upon any other persons directed by the surrogate to be notified, in such manner and within such time as the surrogate shall direct, which notice shall have the additional statement included in or endorsed thereon that objections have been filed to the probate of such will and that the same will be heard on a day or at a term of court therein stated. Proof of due service of such notice shall be made and filed in the surrogate's office, and any decree in the proceeding shall not affect the right or interest of any such person unless he shall have been so notified.

§ 148, *Sur. Ct. A. Former § 2618, Code Civ. Pro.*

Bringing in legatees and devisees.

The notice required by section 146, (¶ 77), which must be filed in any case of probate before letters are issued, contains

the names of all the devisees, legatees and beneficiaries named in the will, and that notice with a proper indorsement, or statement embodied therein, giving notice of the contest, should be served in such manner as the court directs. The common practice heretofore adopted of issuing a supplemental citation will not meet the requirements of the present section.

In the first instance it is not necessary to cite devisees and legatees named in the will if they are not heirs-at-law or next of kin, but when objections to the will are filed such devisees and legatees have rights to protect, and before proceeding with the trial of the objections all of such parties should be made parties to the proceeding either by appearance or the service of the notice above described.

The requirement for notice in case a contest is made is designed to benefit legatees and devisees named in the will who may not have been cited in the proceeding. *Cook v. White*, 43 App. Div. 388, 60 N. Y. Supp. 153; aff'd, 167 N. Y. 588.

Framing the issues for trial by jury.

It is customary in the Surrogate's Court of New York county where the volume and importance of the litigation requires a uniform and well settled practice, to require counsel to come before the surrogate on two days cross notice to settle the issues, bringing with them their pleadings, proposed orders and notice of settling same, with proof of due service. *In re Plate*, 156 N. Y. Supp. 999, 93 Misc. Rep. 423.

For Rule of New York county Surrogate's Court for framing the issue. See ¶ 31.

Notice to infant legatees and devisees of contest.

Notice of contest is given to infant and incompetent legatees, beneficiaries and devisees in the manner prescribed, and they then become parties to the proceeding. A special guardian may be appointed for them upon filing proof of service of notice, who acts whether the case is heard by the surrogate or certified to another court.

Compromise of contest.

Authority is now given by section 73, Real Property Law, to compromise a contest of probate when there are infants and absentees by approval of the court. See ¶ 219.

¶ 53 Trial of Objections by the Court or by the Court and Jury.

Proceedings upon jury trial of contested probate.

Upon the trial before the court and a jury of the objections filed to the probate of a will, or codicil, or either, the verdict of the jury or any order or decision of the judge holding the court shall be entered in the minutes of the court; and if the trial was not held in the surrogate's court, such verdict, order or decision shall be certified by the clerk of the court to the surrogate's court, whereupon the surrogate shall enter a final decree accordingly.

§ 149, *Sur. Ct. A.* Former § 2619, *Code Civ. Pro.*

Former section 2553-a, providing for a jury trial in Supreme Court has been repealed. Under the present practice one trial of the validity of a will is had, either before the surrogate, before the surrogate and a jury, or before a jury in the Supreme or County Court. This one trial is conclusive in all courts, and another cannot be had in an ejectment or partition action.

The jurisdiction of the surrogate's court has been enlarged, (§ 40, ¶ 14), and a decree has been given additional force and effect, (§ 80, ¶ 33.) General provisions for jury trial are found in sections 68, 69, (¶ 31), and a special provision that a jury trial must be demanded in the objections is found in section 147. Notice that the will is contested must be given as provided in section 148; a provision for security for costs is made by section 282, (¶ 157.)

Upon the return of citation any party may have a full examination of the subscribing witnesses and of any other witness necessary to be examined by the proponent to satisfy the surrogate, which witnesses may be cross-examined. This is a right every one should have, and it often ends the contest. If any one desires to become a contestant he must then file objections, and if he desires a jury trial, demand it. The trial by

jury is then had either in surrogate's court or some other, and the verdict is made a part of the proceedings in surrogate's court.

The final decree is conclusive against everybody who was a party or who was served with notice pursuant to section 148. If a jury trial is not demanded it is waived, and the decree in that case is also conclusive.

Bill of particulars. See ¶ 25.

Where contestants allege undue influence, the names of the beneficiaries in the will, being those persons most likely to have influenced the testator, if such influence was exerted, give sufficient information to the contestant and a motion for a bill of particulars should be denied. *In re Vetter*, 158 N. Y. Supp. 449, 93 Misc. Rep. 63.

Trial of objections.

When objections are filed after the examination of the witnesses, the petitioner should not then rest upon the formal deposition of the witnesses as he did in the preliminary examination, since such deposition is necessarily not sufficiently full and complete to be relied upon as a complete *prima facie* case where a contest is being made.

Under such circumstances it is necessary that the proponent should orally examine the subscribing witnesses to show not only the due formal execution of the will but also to show the surrounding facts and circumstances which are required by the Surrogate's Court Act, section 144, ¶ 63, to be shown to the satisfaction of the surrogate.

Proponents should establish factum of will and rest.

On the issue of testamentary capacity the burden of proof in a contested probate proceeding is on the whole case undoubtedly on the proponent. But in the first instance the proponent in going forward need only satisfy the statute on this point.

If the contestants then offer evidence on the issue which

shifts *onus probandi*, the proponents must offer further evidence or fail. *In re Huber*, 103 Misc. Rep. 599, 170 N. Y. Supp. 901.

When objections are filed the proponent should establish the *factum* of the will by the examination of the subscribing witnesses; show, if it be a fact, that there was an attestation clause upon the will; and also, if it be a fact, that a competent lawyer superintend its execution. After having produced the evidence making a *prima facie* case, the proponent may rest.

The contestants then proceed with the proof under their objections, and when they have finished the proponent may give further evidence in support of the paper. *Matter of Sperb*, 71 Misc. Rep. 378, 130 N. Y. Supp. 122.

Will and codicil. Order of proof.

Proponent will not be compelled to give proof entitling the will to probate, before he can give proof of execution of the codicil. *Matter of Francis*, 73 Misc. Rep. 148, 132 N. Y. Supp. 695.

Evidence of mutual wills.

It is proper to receive evidence of the prior making of mutual wills, as also of all other facts which bear upon the relations in life of the testator. *Matter of Sandberg*, 75 Misc. Rep. 38, 134 N. Y. Supp. 869.

Charge to jury.

A model and technical charge to the jury, with directions for verdicts upon the several issues given by Mr. Surrogate Fowler will be found in the case of *In re King*, 172 N. Y. Supp. 869.

Questions submitted.

Questions as to due execution and capacity may be submitted separately, and that is probably the better practice, for if not submitted separately, the verdict might be set aside if the court found that either question had been incorrectly an-

swered. *Perham v. Cottle*, 98 Misc. Rep. 48, 162 N. Y. Supp. 21, aff'd, 178 App. Div. 949, 165 N. Y. Supp. 1106.

Direction of verdict.

The statement that "there is no evidence to go to a jury," does not mean that there is literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established. *Matter of Case*, 214 N. Y. 199-204.

If in law the circumstantial evidence adduced in support of undue influence is insufficient, it is error for the surrogate to leave the case to the jury. *In re Caffrey*, 95 Misc. Rep. 466, 159 N. Y. Supp. 99.

The conflict of evidence should be clear to warrant the submission to a jury of the well defined issues arising in a contested probate. Unless there is an actual conflict of evidence upon material matters, the surrogate should not submit the issues to a jury. *In re Huber*, 103 Misc. Rep. 599, 170 N. Y. Supp. 901. *In re Tymeson*, 187 N. Y. Supp. 330.

The credibility of witnesses under some circumstances may be a question to be left to the jury, and in such a case it would be error to direct a verdict. *In re Perkett*, 192 App. Div. 846, 183 N. Y. Supp. 109; *Matter of Kindberg*, 207 N. Y. 220.

¶ 54 Competency of Witnesses and Evidence Offered in Probate Proceeding.

When party, etc., cannot be examined.

Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise; concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee, or person so deriving title or interest, is examined in his own behalf, or the testimony of the

lunatic or deceased person is given in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding or interested in the event thereof. § 347, *Civ. Pr. A.* Former § 829, *Code Civ. Pro.*

When the Legislature decided to change the common-law rule of evidence which prohibited parties from testifying upon the trial of an action, it was deemed necessary to surround the change with certain limitations in order to protect the estates of deceased persons and those claiming under them. Accordingly, after providing that parties and persons interested in the event of an action should be competent witnesses, it was further provided that they should not be examined in their own behalf as against the personal representative of a deceased person concerning a personal transaction or communication between the witness and the decedent. This limitation was made on the theory that the voice of the survivor should not be heard when that of the other party is silent in death. When, however, the personal representative gives evidence in his own behalf or the testimony of the decedent is given in evidence concerning such a transaction, the door is open to the survivor to testify fully in his own behalf in regard to that transaction. *Potts v. Mayer*, 86 N. Y. 302.

The statute has been many times amended, but in all the changes the uniform effort of the Legislature has been to so carefully balance rights that the survivor should not take advantage of a deceased person and the personal representative should not take advantage of a survivor. The party for whose protection the limitation was made may keep the door closed if he chooses, but if he opens it at all he opens it wide as to any transaction concerning which he examines the survivor. *Cole v. Sweet*, 187 N. Y. 488; aff'g, 112 App. Div. 777

It was said in the opinion of the Court of Appeals in *Holcomb v. Holcomb* (95 N. Y. 316-325), in relation to section 829, *Code Civ. Pro.*, "The words of exclusion are as comprehensive as language can express. Transactions and communications embrace every variety of affairs which can form the

subject of negotiation, interviews, or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another. The statute is a beneficial one, and ought not to be limited or narrowed by construction. Although it must appear that the interview or transaction sought to be excluded was a personal one, it need not have been private or confined to the witness and deceased. If they participated, it does not change its character because others were present. A contrary rule would defeat the reasonable intent of the statute that a surviving party should be excluded as one interested from maintaining by his testimony an issue which in any degree involved a communication or transaction between himself and a deceased person." *Heyne v. Doerfler*, 124 N. Y. 505, 509.

Witness incompetent.

Parties to the proceeding to probate a second will which revokes a prior will in which they are interested are incompetent witnesses against the second will. *Matter of Jeffrey*, 129 App. Div. 791, 114 N. Y. Supp. 667.

In *Lane v. Lane*, 95 N. Y. 494, the evidence of the testator's wife, who was a legatee under the will, had been admitted to prove the conversations taking place at its preparation and execution, and the judgment was reversed because thereof.

In matter of the probate of the will of *Smith* (95 N. Y. 516), it was held that a legatee *and executor* of the will offered for probate was not competent to testify to the instructions of the testator and execution of a will.

In *Lodeler v. Whelpley* (111 N. Y. 239) it was held that the testimony of a legatee under a will, so far as it relates to communications with the testator or transactions with him, is inadmissible on proceedings taken for the admission of the will to probate.

In the *Matter of Eysaman* (113 N. Y. 62), it was held that a legatee was not a competent witness to testify in favor of the will.

Incompetency must be shown by objector.

That the witness is competent need not be shown by the party calling him, but his incompetency must be shown by the objectors. *Abbott v. Doughan*, 204 N. Y. 223.

Exclusion of incompetent testimony by the surrogate on his own motion.

Mr. Surrogate Fowler says that it is the duty of the surrogate on his own motion to see that incompetent evidence is not accepted in a probate proceeding. *In re King*, 172 N. Y. Supp. 868.

Wife having inchoate dower right.

The wife of a man who would take real estate by descent if the will should fail of probate, is interested within the meaning of this section, and is incompetent as a witness. *Eckert v. Eckert*, 13 App. Div. 490, 43 N. Y. Supp. 353.

Wife of heir-at-law who would be vested with title to real estate upon defeat of the will not competent witness against it. The property interest would be a subsisting, tangible, valuable one, making her a "person interested in the event." *Simar v. Canaday*, 53 N. Y. 298, 303 *et seq.*; *Clifford v. Kampfe*, 147 id. 383; *Steele v. Ward*, 30 Hun, 555; *Erwin v. Erwin*, 54 id. 166; *Matter of Hewitt*, 21 Wkly. Dig. 296; *Baldwin v. Walker*, 67 Hun, 651; *Matter of Clark*, 40 id. 233, 237; *Matter of Blaine*, 143 App. Div. 687.

Testimony of interested person present, but not participating.

An interested person was called by proponent. He was present at the execution of the will but took no part — *held* incompetent on the main issue; and evidence that he gave on question of competency — *held* not to have affected the result and not to require reversal. *Matter of Bernsee*, 141 N. Y. 389; *aff'g*, 71 Hun, 27, 53 N. Y. St. Repr. 872, 24 N. Y. Supp. 504.

A legatee present at the execution of the will not permitted to testify to the acts of execution, although he took no real part in them, nor to conversations of the deceased with others

in which the witness took no part. *Matter of Eysaman*, 113 N. Y. 62.

A son not allowed to state acts he saw his father do and words he heard him say, although the son took no part in them and he saw and heard these things as any other person might have done. *Holland v. Holland*, 98 App. Div. 366; *Holcomb v. Holcomb*, 95 N. Y. 316.

Incompetency may be waived.

The limitations of the statute may be waived by the personal representative, not only by the failure to object on the proper ground, but also by calling the survivor as a witness and going into a transaction had by him with the decedent in person. The statute does not make the survivor incompetent generally, even as a witness in his own behalf, but only as against the personal representative and concerning a personal transaction with the decedent. The personal representative, therefore, may call his adversary and examine him at will as to any transaction with the decedent, but in so doing he waives the benefit of the statute and opens the lips of the witness so that he can testify in his own behalf fully and at large as to the transaction thus gone into. *Nay v. Curley*, 113 N. Y. 575; *Merritt v. Campbell*, 79 id. 625.

Legatee may release his interest and become competent.

It would seem that an interested witness may be made competent to testify against the will as to personal transactions by releasing his interest, where such interest is that of a legatee solely. But where such interest is that of a next of kin or heir-at-law or the wife of an heir-at-law, such release or conveyance would be considered an assignment of interest; and the witness would still be incompetent.

One who is a legatee, but otherwise having no interest in the estate, may release and discharge such legacy by an instrument in writing duly executed and delivered, and thereby become competent to testify upon probate. *Matter of Wilson*, 103 N. Y. 374; *Stebbins v. Hart*, 4 Dem. 501; aff'd, 38 Hun,

643; *Matter of Fitzgerald*, 33 Misc. Rep. 325, 68 N. Y. Supp. 631; *Hulse v. Bacon*, 40 App. Div. 89, 57 N. Y. Supp. 537; aff'g, 26 Misc. Rep. 455, 57 N. Y. Supp. 537; aff'd, 167 N. Y. 599; *Loder v. Whelpley*, 111 N. Y. 239; aff'g, 1 Dem. 368.

An oral declaration of release made on the stand was held sufficient. *Matter of Berrien*, 12 N. Y. Supp. 587, 35 N. Y. St. Repr. 255.

Called in favor of will.

A legatee who may also be an heir-at-law or next of kin, may become competent by releasing his legacy, and then his evidence in favor of the will becomes competent as against his interest as heir-at-law or next of kin.

The same rule applies where a person is a legatee under two wills, and in such case he may testify in favor of the will under which he takes the least, as such testimony will be against his interest. *Matter of Kindberg's Will*, 207 N. Y. 220.

Heir-at-law must deed to testify against will.

Where the legatee is also an heir-at-law a release or waiver would not divest him of his title to land, and in such a case the heir must execute and deliver a deed. *Matter of Fitzgerald*, 33 Mis. Rep. 325, 68 N. Y. Supp. 632; *Bennett v. Bennett*, 50 App. Div. 127, 63 N. Y. Supp. 387; *Matter of Torkington*, 79 Hun, 128, 29 N. Y. Supp. 433, 61 N. Y. St. Repr. 426.

Release of interest by witness in actions.

If the general release is adopted, and it results in vesting the title to the property released in another person who is a party to the action or interested in its event, the witness is not by the execution of the release rendered competent to testify.

The test as to whether or not the witness has been rendered competent is to be found in the legal effect of the instrument by means of which his interest was extinguished. *O'Brien v. Weiler*, 140 N. Y. 281.

In an action under former section 2653-a, Code Civ. Pro., an heir attempted to release his interest in the real estate, and he

was held to be an incompetent witness since the release was to no one in particular. The court said if it had been effective, he would not have been competent inasmuch as the plaintiff, in whose behalf he was called, would then derive a part of his title and interest from the witness by virtue of such release. *Bennett v. Bennett*, 50 App. Div. 127, 63 N. Y. Supp. 387; *Matter of Torkington*, 79 Hun, 128; 29 N. Y. Supp. 433.

¶ 55 Competency of Physicians, Nurses, Attorneys and Clergymen as Witnesses.

Physicians or professional registered nurses not to disclose professional information.

A person duly authorized to practice physic or surgery, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity; * * *

From § 352, *Civ. Pr. A.* Former § 834, *Code Civ. Pro.*

History and scope of section 352, Civil Prac. Act.

For a full discussion of the history and development of the three sections dealing with the subject see *Clifford v. Denver & R. G. R. R. Co.*, 188 N. Y. 349 and *Matter of Cunnion*, 201 N. Y. 123.

The amendment of 1899 must be read in the light of the object of the statute which was to prevent the disclosure of a patient's secrets against his will, not to interpose an obstacle to the administration of justice by suppressing facts already made public by the patient himself in a legal proceeding. The Legislature did not intend to allow a party to cause a record to be made and filed in a public office in which the testimony of his physician, taken at his instance, is set forth at large, stating confidential facts material in a controversy with another party, and then to prevent that evidence from being read before the jury by advancing as his only objection that it would divulge private matters. The language of this section limiting waivers to such as are made in open court on the trial of an action or by the stipulation of the attorneys for the respective parties should be so construed as to promote, not to

defeat, the purpose of the statute. *Clifford v. Denver & R. G. R. R. Co.*, 188 N. Y. 349, revg. 111 App. Div. 513.

Under this section it has been held that a physician cannot testify as to the previous condition of a person, whose knowledge was acquired while attending such person (*Barker v. Cunard Steamship Co.*, 91 Hun, 495; aff'd without opinion in 157 N. Y. 693); and that information of the existence of an ailment, although not the subject of the physician's attendance or treatment, acquired through examination of the patient in attending him in a professional capacity, is privileged (*Nelson v. Village of Oneida*, 156 N. Y. 219; aff'g, 85 Hun, 616) and that upon the probate of a will the testimony of a physician who attended upon the testator in a professional capacity is not competent upon the question of mental capacity. *Matter of Coleman*, 111 N. Y. 220; *Matter of Preston*, 113 App. Div. 732, 735, 99 N. Y. Supp. 312.

Testimony as to disease of which a party died who was a relative of testator cannot be shown by the physician of such relative, since the privilege extends to persons who are not parties to the proceeding. *Matter of Myer*, 184 N. Y. 55, 58, revg. 100 App. Div. 512.

It would be error to hold that the plaintiff could not prove by an attending physician any information as to the mental or physical condition of the testator unless all the parties to the action waived the privilege.

It is confidential communications and such facts as would tend to disgrace the memory of the patient that are prohibited. *Lippe v. Brandner*, 120 App. Div. 230, 105 N. Y. Supp. 225.

Weight of evidence of physician based on hypothetical question as to competency.

The weight to be given to the evidence of a physician based upon assumed facts is for the court or jury to determine. Where the facts assumed in the hypothetical question do not in the judgment of the court or jury exist, the evidence is deprived of much of its force. *In re Robinson*, 87 Misc. Rep. 164, 150 N. Y. Supp. 115.

Dentist.

A dentist is not a person incompetent as a witness under these sections. *Howe v. Regensburg*, 75 Misc. Rep. 132, 132 N. Y. Supp. 837.

Attorneys and counselors not to disclose communication.

An attorney or counselor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment nor shall any clerk, stenographer or other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon.

§ 353, *Civ. Pr. A.* Former § 835, *Code Civ. Pro.*

For the history of this section, see *Clifford v. Denver & R. G. R. Co.*, 188 N. Y. 349; *Matter of Cunnion*, 201 N. Y. 123.

The management of a client's property, or acting as depository of such property, is not the professional function of an attorney, but that of a mere agent. *Phoebus v. Webster*, 40 Misc. Rep. 528; *Mulford v. Muller*, 1 Keyes, 31

Conceding, indeed, that the privilege should cover communications even of the most indirect character as, for example, information derived from an examination of the client's papers (*Charman v. Tatum*, 54 App. Div. 61, 66), such considerations would not be pertinent to the case, in which the questions are directed to the mere control or custody by counsel of the client's property. It has been plainly held that the attorney may be compelled to produce any document which the client could be compelled to produce. *Jones v. Reilly*, 174 N. Y. 97, 105; *Matter of Howe v. Stuart*, 68 Misc. Rep. 352, 123 N. Y. Supp. 921.

It was settled in the cases which arose before the enactment of the Code provisions on the subject that the privilege of the attorney (or rather that of the client, for it is such) does not extend to everything which comes to his knowledge while acting as attorney or counsel, and does not include information derived from other persons or other sources. *Crosby v. Berger*, 11 Paige, 377; *Bogert v. Bogert*, 2 Edw. Ch. 399; *Coveney v. Tannahill*, 1 Hill, 33. The section of the Code is a mere re-

enactment of the common-law. *Hurlburt v. Hurlburt*, 128 N. Y. 420.

Where the contents of the will is not made known to the witnesses, the attorney cannot testify as to the contents, since no waiver is made, by the fact that other persons were present who did not know the contents. *Matter of Cunnion*, 61 Misc. Rep. 546, 135 App. Div. 864; *aff'd*, 201 N. Y. 123; *Matter of Bethany M. E. Ch. v. Brooks*, 143 App. Div. 685, 128 N. Y. Supp. 250.

As the statute now reads, no act of the client, except a waiver upon the trial, can be treated as a waiver of the prohibition of disclosure; and, except he is an attesting witness to a will, in no case is an attorney permitted to make disclosure in respect to the contents of any documents or other information communicated to him in the course of his professional employment by his client. *Matter of Cunnion*, 201 N. Y. 123, *aff'g*, 135 App. Div. 864; *Reintelen v. Schaefer*, 152 App. Div. 727.

Attorney or draughtsman.

An attorney who superintends the execution of a will but is execution since the testator will be held to have waived the not a witness is not precluded from testifying to the facts of privilege. *Matter of Barnes*, 70 App. Div. 523, 75 N. Y. Supp. 373.

An attorney who was present when the will was executed, but who is not a subscribing witness, is incompetent to testify to the facts of execution. *Matter of Sears*, 33 Misc. Rep. 141, 68 N. Y. Supp. 363; *Matter of Francis*, 73 Misc. Rep. 148.

Communication in presence of third persons.

A communication between attorney and client made in the presence of a third person is not privileged. *People v. Buchanan*, 145 N. Y. 1; *Doheny v. Lacy*, 168 *id.* 213; *aff'g*, 42 App. Div. 218, 59 N. Y. Supp. 724; *Matter of McCarthy*, 55 Hun, 7, 28 N. Y. St. Repr. 342, 8 N. Y. Supp. 578; *Russeau v. Bleau*, 131 N. Y. 177.

A lawyer employed by the parties to draw a deed may testify to facts and instructions communicated to him by the parties, as such statements are not privileged. *Hebbard v. Haughian*, 70 N. Y. 54; *Van Alstyne v. Smith*, 82 Hun, 382, 63 N. Y. St. Repr. 595, 31 N. Y. Supp. 277; *Sommer v. Oppenheim*, 19 Misc. Rep. 605, 44 N. Y. Supp. 396.

The rule of privilege cannot be invoked by one of two or more parties or their representatives, where both were present when the communications were made. They are not confidential. *Doheny v. Lacy*, 168 N. Y. 213; aff'g, 42 App. Div. 218.

Where the attorney employed by the parties to draw a deed and assignment of mortgage to secure a debt gave advice upon the subject, he was not allowed to disclose the transaction in a suit by third persons. *Root v. Wright*, 84 N. Y. 72.

A communication may not be privileged when made by two or more persons in consultation with their attorney for mutual benefit, or in the presence of third persons. *Gick v. Stumpf*, 126 App. Div. 548, 110 N. Y. Supp. 712; *Hurlburt v. Hurlburt*, 128 N. Y. 420.

In cases of mutual wills.

The attorney who draws mutual wills may testify as to the mutual conversation in an action or proceeding between the beneficiaries under such wills. There is no privilege of the witness in such a case. *Wallace v. Wallace*, 216 N. Y. 28.

Application of the last three sections.

The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. But a physician or surgeon or a professional or registered nurse, upon a trial or examination may disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of section 352 have been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said

will, or the surviving husband, widow or any heir-at-law or any of the next of kin, of such deceased, or any other party in interest. But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto. In an action for the recovery of damages for a personal injury the testimony of a physician or surgeon, or of a professional or registered nurse attached to any hospital, dispensary, or other charitable institution as to information which he acquired in attending a patient in a professional capacity, at such hospital, dispensary, or other charitable institution shall be taken before a referee appointed by a judge of the court in which such action is pending; provided, however, that any judge of such court at any time in his discretion, notwithstanding such deposition, may order that a subpoena issue for the attendance and examination of such physician or surgeon or professional or registered nurse, upon the trial of the action. In such case a copy of the order shall be served, together with the subpoena. The provisions of this act and rules relating to depositions of witnesses taken and to be used within the state apply to the examination of a physician or surgeon or a professional or registered nurse, as prescribed in this section. The waivers herein provided for must be made in open court, on the trial of the action, or proceeding, and a paper executed by a party prior to the trial, providing for such waiver shall be insufficient as such a waiver. But the attorneys for the respective parties prior to the trial may stipulate for such waiver, and the same shall be sufficient therefor.

§ 354, Civ. Pr. A. Former § 836, Code Civ. Pro.

A waiver of privilege should be made by the entry in the records and a stipulation signed by the attorneys for the party. *Geis v. Geis*, 116 App. Div. 362, 101 N. Y. Supp. 845.

A husband having filed objections to the probate of the will of his wife, and having then died, his executor was brought in as a party. The executor called a physician to testify against the will, and waived the privilege of the physician. It was held that the executor was a "party in interest" and could waive the privilege. *In re Mele's Estate*, 157 N. Y. Supp. 669, 94 Misc. Rep. 555.

Waived by taking testimony by commission.

"While there is no doubt that the examination of a witness under a commission cannot be regarded for all purposes as part of the trial, still the taking of testimony to be used as evidence by either party may well be regarded as a part there-

of so far as it affects the question now before us. The application for a commission is made in open court, to take evidence to prove or disprove the issue. It is a proceeding authorized by law to compel a witness to give evidence to be used in deciding the case. Although preliminary to the formal trial in point of time, in substance it may be held so much a part of the trial as to comply with the amendment of 1899, passed for the purpose, already pointed out, of preventing waivers by contract made long before the commencement of the action. And where the testimony of the physician is caused to be taken by the patient, such testimony is available to the other party upon the trial." *Clifford v. Denver & R. G. R. Co.*, 188 N. Y. 349, revg. 111 App. Div. 513.

CHAPTER XVI.

Evidence and Its Force and Effect in Probate Proceeding.

- ¶ 56. Declarations of deceased as to making or revoking a will.
 - Opinions of witnesses.
 - Admissions of a party.
 - Evidence by judgment or record of another court.
 - Evidence by chemical test of writing.
- ¶ 57. Evidence as to sound mind.
 - Effect of evidence of insanity of relatives.
 - Illusion, delusion, hallucination, paralysis, and senile dementia.
- ¶ 58. Effect of being adjudged a lunatic, or of being proved to be a drunkard.
- ¶ 59. Evidence of undue influence.
- ¶ 60. Undue influence; legacy to draftsman, attorney or clergyman.
- ¶ 61. Evidence of knowledge of contents where will is signed by mark.
 - Allegations of fraud, conspiracy or deceit.
- ¶ 62. Burden of proof; effect of attestation clause.

¶ 56 Evidence; Declarations of Deceased; Opinion of Witnesses; Admissions; Judgment of Another Court.

Declarations of deceased as to making or revoking a will.

The courts have held that declarations of a testator, made subsequent to the event, are inadmissible upon the issue of the making or revocation of a will, it being held that the consideration of such evidence would be in effect a repeal of the requirements of the statute. It is true that cases may be cited where such evidence has been admitted without objection, and the courts have commented upon it and seem to have given it considerable weight, but no case has been called to our attention which has held that where such evidence has been objected to, it was error to exclude it. As a matter of principle, it would seem that such evidence must be incompetent. If it is admissible, a will could be established or revoked without proof that the formalities which the law has hedged around testamentary papers had in any respect been complied with. The only declarations of a testator in respect to such papers which are competent are those that he makes at the time of ex-

ecution, they being then part of the *res gestae*. The requirement of the statute, that the signatures to wills of such witnesses as may be dead shall be proved, shows that nothing short of common-law proof of the facts required by the statute to attend the execution of testamentary papers will suffice. The intention of a testator may be a guide in the construction of a will, but it will not supply, no matter how proven, proof of compliance with the requirements of the law. *Matter of Burbank*, 104 App. Div. 312; aff'd, 185 N. Y. 559.

No declarations of the testator are admissible except such as accompany the act by which the will is revoked. *Waterman v. Whitney*, 11 N. Y. 157.

Evidence of declarations of a testator incompatible with the validity of his will are incompetent. *Matter of Shaw*, 1 Dem. 21.

Declarations competent to show state of mind.

Where testator's mental capacity is in issue, declarations near the time of making the will are admissible as part of the *res gestae*, for the purpose of showing the state of the testator's mind, but are incompetent to prove the external facts of fraud or undue influence. *Marx v. McGlynn*, 4 Redf. 455.

Declarations of testator before and after execution of will may be received in connection with other evidence to show condition of mind as bearing upon the question of competency or undue influence. *Matter of Waterman v. Whitney*, 11 N. Y. 157.

Declarations in letters and other writings.

Letters written by alleged testator even to the proponents are not objectionable when proved to be in his handwriting.

In *Ridden v. Thrall*, 125 N. Y. 572, action was brought to recover deposits in bank claimed to have been given to plaintiff.

A letter was found in the drawer of the deceased depositor after his death, giving the bank books to the plaintiff.

This letter was proved to be in the handwriting of the deceased and was admitted in evidence as proof of the gift.

Judge Earl said: It was competent as corroborating evidence just as the oral or written declarations of the donor previously made would have been * * * I have found no authority condemning such evidence.

In all cases where probate of a will is contested on the ground of undue influence, fraud, incompetency or forgery, the previous declarations or statements, in any form, of the testator showing an intention in harmony with the instrument offered for probate have always been competent, as corroborating other evidence offered by the proponent.

All such declarations may be received in *support of a will*. *Jones on Evidence*, § 482.

Evidence from contents of another will are declarations.

The dispositions contained in an earlier will, like other declarations, spoken or written, are competent evidence. *Matter of Mooney*, 73 Misc. Rep. 315, 132 N. Y. Supp. 705. *Matter of Hermann*, 87 Misc. Rep. 476; 150 N. Y. Supp. 118; *Waterman v. Whitney*, 11 N. Y. 157.

Opinions of witnesses.

Where nonprofessional witnesses, who did not attest the execution of the will, are examined as to matters within their own observation bearing upon the competency of the testator, they may characterize, as in their opinion rational or irrational, the acts and declarations to which they testify; but the examination must be limited to their conclusions from the specific facts they disclose, and they cannot be permitted to express their opinions on the general question whether the mind of the testator was sound or unsound. *Matter of Ross*, 87 N. Y. 514; *Clapp v. Fullerton*, 34 id. 190; *Hewlett v. Wood*, 55 id. 634; *Holcomb v. Holcomb*, 95 id. 316; *Dewitt v. Barley*, 9 N. Y. 371. The lay witness can only give his impression; he cannot give an opinion as to sanity or insanity. The following would seem to be a proper question:

“ Taking into consideration the conduct, statements, conversations, and appearance of ———, as testified to by you, how did they impress you, at the time — as rational or irrational?” *Humiston v. Wood*, — App. Div. —, 188 N. Y. Supp. 213; *Matter of Myer*, 184 N. Y. 55, 60, revg. 100 App. Div. 512.

Conclusions of law not competent.

A witness should not be asked whether the testator was competent to devise real estate, or to execute a deed, as such conclusions of law are inadmissible. *Dewitt v. Barley*, 17 N. Y. 340.

Medical witness.

A physician when qualified as an expert may be asked an hypothetical question which assumes certain facts claimed to have been established, and which concludes: “ Assuming such facts to be true, was the testator in your opinion sane or insane?” The physician should not be asked to base his opinion upon the evidence which he has heard given in court, for that evidence may or may not be true. *People v. Lake*, 12 N. Y. 358. Such witness may also be asked and state his opinion as to the character of the mental or physical disorder from which the testator was suffering.

Opinions of subscribing witnesses.

Subscribing witnesses may express their opinion as to the soundness of mind of the testator, although other witnesses may not. It is, however, not proper to ask a subscribing witness whether the testator was competent in all respects to devise real property.

The greatest latitude is usually allowed in the examination of subscribing witnesses, who are the persons selected by the testator to know and understand his mental and physical condition, and thereby he holds them out as persons particularly qualified to give testimony.

Admission by one party does not bind another, and is, therefore, incompetent.

“ The general doctrine is doubtless correct that the admissions or declarations of a party to the record may be taken as against himself or another party having a joint interest with him, but this rule can have no application to a proceeding to prove a will where other parties are interested in the estate as tenants in common. In this case the admissions or declarations of the nephew could not bind the sister, and since upon proof of a will there can be but one decree, either of rejection of probate, the declarations of one of the parties cannot, from the very nature of the case, be received as evidence without prejudice to the rights of the other. One tenant in common cannot admit away the rights of his co-tenant. Since the will could not have been admitted as to the sister and rejected as to the nephew, the admissions or declarations of the latter were not admissible. The respective interests of the next of kin were not joint, but each would hold his share in severalty. There was no privity between the parties such as would permit the admissions or declarations of one to be received as evidence against the other.” *Dan v. Brown*, 4 Cow. 483, 492; *Grant v. Grant*, 1 Sandf. Ch. 235; *Brush v. Holland*, 3 Bradf. 240; *La Bau v. Vanderbilt*, 3 Redf. 384, 399; *Matter of Baird*, 47 Hun, 77; *Naul v. Naul*, 75 App. Div. 292; *Clark v. Morrison*, 25 Pa. St. 453; *Pier v. Duff*, 63 id. 59; *Shailer v. Bumstead*, 99 Mass. 127; *Matter of Kennedy*, 167 N. Y. 163, aff’g, 53 App. Div. 105, 65 N. Y. Supp. 879, which aff’g, 30 Misc. Rep. 1, 62 N. Y. Supp. 1011; *Adams v. Massey*, 184 N. Y. 62, revg. 102 App. Div. 620.

Evidence by records of asylum.

How far records of an asylum to which testator was committed years before the alleged execution of the will may be received in evidence, and the force and effect of such evidence is discussed in *Matter of Barney*, 185 App. Div. 782, 174 N. Y. Supp. 242, where the decree of the Surrogate’s Court denying probate after verdict of a jury was reversed.

Evidence by judgment of another court.

In a probate proceeding a judgment between the same parties wherein was involved and determined questions of law and fact involved in the probate proceedings is competent evidence. *Peck v. Callaghan*, 95 N. Y. 73.

That part of an inquisition finding a person incompetent for more than a year prior to the time it was taken cannot be received in evidence. *Matter of Preston*, 113 App. Div. 732, 99 N. Y. Supp. 312.

Record of probate had in another State is not evidence upon attempted probate here, as a will duly probated in another State can not be probated in this State. *Matter of Cameron*, 47 App. Div. 120, 62 N. Y. Supp. 187; aff'd, 166 N. Y. 610, no. op.; *Matter of Law*, 80 App. Div. 73, 80 N. Y. Supp. 410; aff'd, 175 N. Y. 471.

Probate in common form in Missouri followed by action in the circuit court is not a bar to probate in this State in a proper case. *Matter of Sands*, 62 Misc. Rep. 146.

Evidence of chemical test of writing.

A chemical test of papers propounded before the surrogate may be allowed when the test is kept within careful limitations. *Matter of Monroe*, 1 Connoly, 436; *Matter of Wait*, 16 N. Y. St. Repr. 292, 1 N. Y. Supp. 784.

Some courts have looked with doubt upon the propriety of allowing such tests upon wills, saying that the very paper itself, unchanged, in its exact original form and character, is often of the highest importance to parties in interest in litigation subsequent to the original probate. *Matter of Gartland*, 60 Misc. Rep. 33.

¶ 57 What Constitutes Sound Mind.

The courts have frequently defined what constitutes a person of sound mind within the meaning of the statutes relating to making a will, and we quote from *Delafield v. Parish* (25 N. Y. 9): "We have held that it is essential that the testator has

sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the Statute of Wills, a person of sound mind and memory, and is competent to dispose of his estate by will."

In *Horn v. Pullman* (72 N. Y. 269), the court, in speaking of incapacity, say it cannot be "inferred from an enfeebled condition of mind or body," and further say: "Such a rule would be dangerous in the extreme, and the law wisely sustains testamentary dispositions made by persons of impaired mental and bodily powers, provided the will is the free act of the testator and he has sufficient intelligence to comprehend the condition of his property and the scope, meaning, and effect of the provisions of the will." That the testator may have received some unjustifiable impression, which had actuated him in making his will, does not warrant us in calling it a delusion. A man may even have an insane delusion and yet be able to make a valid will; for the will to be invalid must be the result itself of the delusion, and it is not a delusion which incapacitates if the proof of its existence depends upon external and observable facts, giving rise to impressions which, upon investigation, might be proved to be unjust." *Roche v. Nason*, 105 App. Div. 256; aff'd, 185 N. Y. 128.

Acts which show continual insanity discussed. *Haviland v. Hayes*, 37 N. Y. 25.

Case of epileptic fits. *Wood v. Bishop*, 1 Dem. 512.

A mistake in a Christian name of an executor or in the date of the will does not show incapacity. *Matter of Buchan*, 16 Misc. Rep. 204, 38 N. Y. Supp. 1124.

Sound mind does not mean a mind perfectly balanced and free from all prejudice or passion. A husband may conceive false and unjust notions of his wife's character and conduct, and may be prompted by mean and unworthy motives to exclude her from sharing in his estate, and still be entirely sane. *Phillips v. Chater*, 1 Dem. 533.

"Eccentric" and "peculiar."

A person does not lack testamentary capacity even though he is eccentric and peculiar, refuses to do as told by others or his physicians, is unreasonable in his demands upon his family, and his conversation is broken and disconnected. *In re Clapp*, 97 Misc. Rep. 576, 161 N. Y. Supp. 456, aff'd, 177 App. Div. 887, 163 N. Y. Supp. 1112.

Eccentricities, bad manners, and grotesque conduct generally are not evidence of insanity if they are normal to the man himself; an outrageously eccentric man may make a very good will. *In re Martin*, 82 Misc. Rep. 574, 144 N. Y. Supp. 174.

Evidence of insanity of relatives of testator.

The question may be stated thus: "In the absence of any proof whatever of insane conduct on the part of a testator, may the existence of insanity in him be inferred from evidence to the effect that the ancestors or relatives were insane?" We think not. The weight of judicial authority in this country, both in criminal and civil cases, is to the effect that evidence as to the insanity of the ancestors or other relatives of a person whose sanity is called in question is not receivable except in support of proof of acts or language of an insane character on the part of the individual whose mental capacity is in question. Such evidence has frequently been characterized by the courts as cumulative or supplementary, being offered in support of testimony indicating actual insanity. Thus, it was said by this court in the case of *Walsh v. People* (88 N. Y. 458, 467): "It was competent for the prisoner to prove in aid and corroboration of other proof or of circumstances creating

a presumption or tending to justify an inference of insanity at the time of the commission of the act that he inherited a disease which predisposed him to insanity. The insanity of parents or relatives is also admissible upon the issue of insanity. It tends to show an hereditary taint, and supplements evidence of insanity of the accused."

The admissibility of proof of hereditary tendency upon the issue of insanity has been asserted in many cases and in many jurisdictions, but as a rule such proof is held to be receivable only in aid or support of other evidence going directly to establish the existence of a disordered mind in the person whose competency is the subject of inquiry. *Pringle v. Burroughs*, 185 N. Y. 375, 382; aff'g. 100 App. Div. 366.

Evidence of suicidal intent.

The mere fact that testator had taken a poison with suicidal intent does not of itself warrant the deduction that his mind was unsound, or that he lacked testamentary capacity at the time of making the will. *Roche v. Nason*, 185 N. Y. 128, 77 N. E. 1007; *In re Holmberg's Will*, 145 N. Y. Supp. 846.

Illusion, delusion, hallucination.

"As now technically used, especially by the best authorities in medical jurisprudence, illusion signifies a false mental appearance or conception produced by an external cause acting through the senses, the falsity of which is capable of detection by the subject of it by examination or reasoning. Thus, a mirage, or the momentary belief that a reflection in a mirror is a real object, is an illusion."

"A delusion is a fixed false mental conception, occasioned by an external object acting upon the senses, but not capable of correction or removal by examination or reasoning. Thus, a fixed belief that an inanimate object is a living person; that all one's friends are conspiring against one; that all food offered is poisoned, and the like are delusions."

"A hallucination is a false conception occasioned by inter-

nal condition without external cause or aid of the senses, such as imagining that one hears an external voice when there is no sound to suggest such an idea." *Century Dictionary*.

Delusion defined and illustrated.

A person has a delusion when he believes that a certain state of affairs exists which in fact does not, and which can only be accounted for as the result of a perverted imagination, without cause or evidence. This was substantially held by the court in *Matter of Lapham* (19 Misc. Rep. 71, 77).

Bouvier defines a delusion as "a diseased state of mind in which persons believe things to exist which exist only, or in the degree they are conceived of only in their own imaginations, with a persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary."

In *Seamen's Friend Society v. Hopper* (33 N. Y. 619, 624), it is said: "If a person persistently believes supposed facts, which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that case is insanity. Such a person is essentially mad or insane on those subjects, though on other subjects he may reason, act, and speak like a sensible man."

A will should be set aside where it is the offspring of, or its execution is controlled by, a delusion or delusions.

An erroneous belief suggested as a reason for the disinheritance of an heir, to affect the validity of a will, must be shown to be an insane delusion. *Matter of O'Dea*, 84 Hun, 591, 67 N. Y. St. Repr. 143, 33 N. Y. Supp. 463; *Matter of Johnson*, 7 Misc. Rep. 220, 27 N. Y. Supp. 649, 57 N. Y. St. Repr. 846.

In *Riggs v. American Tract Society* (95 N. Y. 503), it was held that it was sufficient to show that the donor was laboring under a delusion, out of which he could not be reasoned, which

led him to make the gift in question and which so took possession of his mind that he could not act upon the subject sensibly.

In *Matter of Gannon* (2 Misc. Rep. 329, 333), the will was set aside by the jury and the judgment affirmed by the appellate court. The concluding portion of the opinion is as follows: "The jury found that Gannon had general testamentary capacity, was not a monomaniac on all subjects, but had an insane delusion affecting the will in question, and was a maniac on that subject, and that such mania influenced the making of the will. That conforms to the rule of this State." *Matter of Loewenstine*, 2 Misc. Rep. 323, 51 N. Y. St. Repr. 423, 21 N. Y. Supp. 931.

Matter of Dorman (5 Dem. 112); *Matter of Lockwood* (2 Connolly, 118); *Matter of Kahn* (1 id. 510), were cases where wills were set aside on the theory that delusions affected their execution. *Matter of Jenkins*, 39 Misc. Rep. 618.

Delusions as to conduct and affection of the husband,—*held not* to require rejection of the will where no act of insanity or improvidence was proved. *Coit v. Patchen*, 77 N. Y. 533.

On questions of testamentary capacity courts should be careful not to confound perverse opinions and unreasonable prejudices with mental alienation. Delusions established. *Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619.

Delusion as to legitimacy of a child,—*held not* to invalidate a will. *Clapp v. Fullerton*, 34 N. Y. 190.

Delusions as to husband,—*held* to be sufficient with other evidence to require rejection of the will, although the husband did not contest. *Matter of Long*, 43 Misc. Rep. 560, 89 N. Y. Supp. 555.

Hallucination.

Hallucinations before execution *held not* sufficient to prevent probate where at the time of execution the mind of testatrix was clear and rational. *Sheldon v. Dow*, 1 Dem. 503.

Being dull and stupid at times and having delusions and

vagaries not connected with his property or relations to his family are not sufficient to show mental unsoundness. *Matter of Richardson*, 51 App. Div. 637, 64 N. Y. Supp. 944.

Belief in spiritualism.

In *Matter of Thompson*, 146 App. Div. 602, a testator had shown a belief in spiritualism but it was held that it did not influence the making of his will.

Testamentary capacity is not affected by a belief in spiritualism where no delusion arises from such belief which enters into the scheme of the will. *Matter of Halbert*, 15 Misc. Rep. 308, 73 N. Y. St. Repr. 434, 37 N. Y. Supp. 757.

Effect of paralysis.

“ The testimony given by the contestant’s witnesses proves that, at certain times, the deceased showed unmistakable evidence of failing mental powers. Some of the incidents described indicate, as to those matters and at those particular times, a complete loss of mental control and, as to other matters, confusion of mind and loss of memory.

The proponent’s witnesses relate incidents occurring during the same period of time which indicate that the deceased was in a normal mental condition at the times mentioned. This opposing evidence is not contradictory, since it describes her state of mind upon different occasions and under various conditions and surroundings.

If we concede that there were times when the deceased was mentally incompetent, then we must have proof that the character of that incapacity, and the nature of the disease which caused it, made it impossible that she could at other times regain her mental power and be competent as testified to by the proponent’s witnesses. The whole evidence must prove that this character of incompetency was permanent when once established.

It is well established by medical experience that loss of mind brought on by hemorrhage of the brain is not often com-

plete, where the patient survives the attack, and is invariably transitory and recurrent thereafter.

We must, then, conclude that this character of evidence establishes only a condition in which a person may be incompetent one day or one week and competent the next day or the next week. Therefore, we must ascertain the actual condition of the deceased on the day the will was executed. *Matter of Winne*, 50 Misc. Rep. 113, 115, 100 N. Y. Supp. 376.

An unnatural will, disinheriting the daughter with whom testatrix lived; evidence that at times she was incapable; no evidence by subscribing witness of mental condition on the day the will was executed, one being dead and the other having forgotten the transaction. Probate denied. *Esterbrook v. Gardner*, 2 Dem. 543.

Testator could not talk and mind was enfeebled, but he comprehended ordinary affairs — *held* to be of sufficient capacity. *Legg v. Myer*, 5 Redf. 628.

Senile dementia.

In senile dementia the evidence of neighbors as to actual condition has great weight, while in paranoia it has less weight. *Matter of Wendell*, 43 Misc. Rep. 571, 89 N. Y. Supp. 543.

Where evidence shows competency at time of execution, the fact that testator was suffering from an early form of senile dementia does not require denial of probate. *Matter of Moyer*, 97 Misc. Rep. 512, 163 N. Y. Supp. 296.

Imbecility.

An imbecile is neither a lunatic nor an idiot. He is defined "as one destitute of strength, either of body or mind; one who is weak, feeble, impotent, decrepit. Imbecility is defined as the quality of being imbecile; feebleness of body or mind." 15 Am. & Eng. Encyc. of Law (2d ed.), 1019. It is not a word of exact meaning, and imbecility is not a disqualification for making a will, provided the testator has the capacity which

the law requires, and that is not determined by any mere generalization of the testator's capacity, but is to be determined from his acts in reference to the particular business in hand. *McGown v. Underhill*, 115 App. Div. 638, 643.

¶ 58 Proof of Will of Adjudged Lunatic, or of a Drunkard.

Proof of will executed by an adjudged lunatic.

In *Carter v. Beckwith*, 128 N. Y. 312, it was held that one who had been judicially determined to be a lunatic, and for whom a committee has been appointed, is incapable of entering into a contract, and any contract he assumes to make is absolutely void. This, however, does not apply to the making of a will. *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 393; *Lewis v. Jones*, 50 Barb. 645; *Breed v. Pratt*, 18 Pick. 115. The inquiry, however, is *prima facie* evidence of incapacity. Lucid intervals may be shown and if, during such a period, a will is made intelligently and freely, it may be established. The proof, however, should be clear and satisfactory, and the burden of proof is upon the proponent. "General lunacy being established, the proof is thrown upon the party alleging a lucid interval; and he must establish, beyond a mere cessation of the violent symptoms, a restoration of mind sufficient to enable the party soundly to judge of the act." *Hall v. Warren*, 9 Ves. 605, 611. In the *Breed* case (*supra*), it is said by Chief Justice Shaw that where a person is under guardianship, as *non compos mentis*, it is incumbent on the party who would establish a will to show beyond reasonable doubt that the testator had both such mental capacity and such freedom of will and action as are requisite to render a will legally valid. See also *Rollwagen v. Rollwagen*, 63 N. Y. 504, 518; *Weir v. Fitzgerald*, 2 Bradf. Sur. 42; *Gombault v. Public Administrator*, 4 Bradf. Sur. 226, 239.

In all cases of probate of wills it must appear that the testator is of sound mind and memory at the time it was made (§ 144), and the standard of mental capacity is uniform.

There must be mental capacity sufficient to enable the testator to understand and appreciate the amount and condition of his property, and to comprehend the nature and consequences of his act in executing the will. *In re Flansburgh's Will*, 82 Hun, 49, 31 N. Y. Supp. 177; *In re Snelling*, 136 N. Y. 515, 32 N. E. 1006; *In re Coe's Will*, 47 App. Div. 177, 96 N. Y. St. Repr. 376, 62 N. Y. Supp. 376; *Matter of Widmayer*, 34 Misc. Rep. 439, 69 N. Y. Supp. 1014; aff'd, 74 App. Div. 336, 77 N. Y. Supp. 663.

Proof of will of drunkard.

The highest degree of mentality is not required in a testator to permit of his making a will; and a drunkard may make a valid will, if, at the time of its execution he comprehends the nature, extent and the disposition of his estate, his relations to those who have or might have a claim upon his bounty, and is free from fraud or coercion. A drunkard is not incompetent, like an idiot, or one generally insane. He is simply incompetent upon proof that, at the time of the act challenged, his understanding was clouded, or his reason dethroned by actual intoxication. *Peck v. Cary*, 27 N. Y. 9; *Matter of Reed*, 2 Connolly, 403; *Matter of Woolsey*, 17 Misc. Rep. 547; *Matter of Halbert*, 15 id. 308.

In *Matter of Johnson* (7 Misc. Rep. 220), testator had been addicted to the use of intoxicating liquors for many years, had suffered delirium tremens, was an inmate of an inebriate asylum and, shortly before the execution of his will, had fallen into an epileptic fit; yet it was held that he had testamentary capacity, and his will was admitted to probate. *Matter of Feeney*, 55 Misc. Rep. 158, 106 N. Y. Supp. 464; *Matter of Tift*, 55 Misc. Rep. 151, 106 N. Y. Supp. 362.

¶ 59 Undue Influence.

The subject of undue influence has so frequently received careful consideration in testamentary jurisprudence that no serious difficulty is encountered in discovering the true rule as

an abstract proposition; the difficulty arises when we attempt to apply such rule to the facts and circumstances of some particular case. *Matter of Hall*, 68 Misc. 581, 125 N. Y. Supp. 253.

Undue influence has been defined as "That which compels the testator to do that which is against his will, from fear, a desire of peace, or some feeling which he is unable to resist." *Schouler Wills*, ¶ 227.

Influence which exists from attachment, affection, or a desire to gratify, or which results from argument and appeals to the reason and judgment of the testator, is not *undue* nor sufficient to invalidate a will. 27 Am. & Eng. Encyc. of Law, 453.

Undue influence consists in exerting upon the testator such an improper influence, whether fraudulent, threatening or otherwise coercive, as to effect a change in the testator's testamentary disposition, so that the will made is not the will he would have made if uninfluenced. *Matter of Martin*, 98 N. Y. 193; *Matter of Vedder*, 14 N. Y. St. Repr. 470; *Matter of Bolles*, 37 Misc. Rep. 562, 568.

Undue influence will not be presumed, but the party asserting it assumes the burden of proving its existence. *Dobie v. Armstrong*, 160 N. Y. 584; *Matter of Nelson*, 97 App. Div. 212; *Matter of Mondorf*, 110 N. Y. 450.

If there are testamentary capacity and knowledge on the part of the testator of the contents of the will and the testamentary requirements of the statute are complied with in its execution, it can be avoided only by proof of influence amounting to force or coercion; and the burden is upon the party making the allegation of showing that testator was imposed upon or overcome by the act or practices of the beneficiary. *Matter of Martin*, *supra*; *Matter of Mabie*, 5 Misc. Rep. 179, 183; *Loder v. Whelpley*, 111 N. Y. 239; *Matter of Williams*, 19 N. Y. Supp. 778.

In the case of absence of direct proof, the charge of undue influence must be established by such an array of circum-

stances as to make the inference of its exercise irresistible; the contestant must show facts utterly inconsistent with the hypothesis of the execution of the will by any other means than undue influence. *Gardiner v. Gardiner*, 34 N. Y. 155; *Loder v. Whelpley*, *supra*; *Marx v. McGlynn*, 88 N. Y. 357; *Matter of Murphy*, 41 App. Div. 153, 58 N. Y. Supp. 450; *Matter of Snelling*, 136 N. Y. 515; *Matter of Liddy's Will*, 5 N. Y. Supp. 639; *Smith v. Keller*, 205 N. Y. 39.

When according to the ordinary motives which operate upon men, we find an unnatural change made in a sick man's will, and one apparently contrary to his previous fixed and determined purpose, it is the duty of courts to scrutinize closely the circumstances, with a view of ascertaining whether the act was free, voluntary and intelligent. *McLaughlin v. McDevitt*, 63 N. Y. 213.

Actual undue influence may consist of threats of personal harm or duress under the force of which a person makes a testamentary disposition of his property which is really against his will. In this same category is the undue influence exerted by a strong mind over a weak one by domination, by deceit, or by constant importunity and persuasion which the weaker mind is unable to resist. Undue influence of this type can never be presumed, but is an issue to be affirmatively established by the contestant; and, unless so affirmatively established, the will must be admitted to probate. This was the character of the undue influence involved in the following cases: *Children's Aid Society v. Loveridge*, 70 N. Y. 387; *Dobie v. Armstrong*, 160 id. 584; *Matter of Martin*, 98 id. 193; *Tyler v. Gardiner*, 35 id. 559; *Cudney v. Cudney*, 68 id. 148; *Matter of Bernsee*, 141 id. 389; *Delafield v. Parish*, 25 id. 9, 97.

Undue influence discussed.

Consult such cases as, *McLaughlin v. McDevitt*, 63 N. Y. 213; *Rollwagen v. Rollwagen*, 63 id. 504; *Chambers v. Chambers*, 61 App. Div. 299, 70 N. Y. Supp. 483; *Wood v. Bishop*, 1 Dem. 512; *Cornwell v. Riker*, 2 id. 354.

There must be evidence showing that the person benefited did exert undue influence. *Cudney v. Cudney*, 68 N. Y. 148.

Evidence that proponent was a son of testatrix, that he communicated to the scrivener the provisions to be inserted in the will, and was himself a beneficiary, is insufficient of itself to show undue influence. *Matter of Martin*, 98 N. Y. 193.

Influence arising from gratitude, affection, or esteem is not classed as undue. *Gardiner v. Gardiner*, 34 N. Y. 155.

Declarations of a testator alone are not competent to prove undue influence, but when acts of others are proved, the declaration of testator may be given to show the operation they had upon his mind. *Cudney v. Cudney*, 68 N. Y. 148.

Opportunity for undue influence.

There are many cases which hold that opportunity to exercise undue influence, with motive to exert it, is not sufficient to establish its exercise, but that it must further appear that such influence was sufficient to overcome the will of the testator; and to avoid a will on this ground the conclusion must be inevitable that the testator's mentality was reduced to helplessness, and that he succumbed to an influence making his will another's and that feebleness of mind or body raises no presumption of lack of testamentary capacity. *Matter of Seagrist*, 1 App. Div. 615; aff'g, 11 Misc. Rep. 188§ aff'd, 153 N. Y. 682; *Brick v. Brick*, 66 N. Y. 144; *Matter of Snelling*, 136 id. 515; *Children's Aid Society v. Loveridge*, 70 id. 387; *Cudney v. Cudney*, 68 id. 148, 152; *Matter of Brunor*, 19 Misc. Rep. 203, 43 N. Y. Supp. 1141; *Matter of Metcalf's Will*, 16 id. 180, 38 N. Y. Supp. 1131; *Matter of Williams' Will*, 15 N. Y. Supp. 828; *Matter of Dunham's Will*, 1 id. 120, 15 N. Y. St. Repr. 869; *Matter of Hawley*, 44 Misc. Rep. 186, 89 N. Y. Supp. 803.

Presumption of undue influence.

There is a presumption of undue influence where a patient makes a will in favor of his physician, a client in favor of his

lawyer, a ward in favor of his guardian, or any person in favor of his priest or religious adviser. *Marx v. McGlynn*, 88 N. Y. 357.

This presumption must be considered as limited to some extent by recent decisions. In two cases where this rule was strictly followed by the surrogate the appellate division has reversed, one being where the attorney was made executor. *Matter of Marlor*, 121 App. Div. 398; revg. 52 Misc. Rep. 263, and the other where the draftsman was made executor and trustee. *Matter of Thompson*, 121 App. Div. 470; revg. 50 Misc. Rep. 222.

Where a person enfeebled by old age or illness makes a will in favor of another person upon whom he is a dependent, and that will is at variance with a former will made, or intentions formed when his faculties were in their full vigor, and is opposed to the dictates of nature and justice, the presumption is that such a will is the result of undue influence, unless that presumption is satisfactorily rebutted by other evidence in the case. *Demmert v. Schnell*, 4 Redf. 409.

Fraud and undue influence will not be inferred from inequality in value of legacies. *Matter of Hall*, 21 N. Y. St. Repr. 307, 3 N. Y. Supp. 288; aff'd, 117 N. Y. 643.

The effect of many of these earlier cases on presumption may be considered modified by more recent decisions.

Burden of proof.

Undue influence is an affirmative assault on the validity of a will and the burden of proof does not shift, but remains on the party who asserts its existence. *Matter of Kindberg*, 207 N. Y. 220.

The burden of proof is upon contestants where it appears that the will was duly executed by a person of sound mind at the time of execution. *Tyler v. Gardiner*, 35 N. Y. 559; *Ewen v. Perrine*, 5 Redf. 640; *Matter of Richardson*, 137 App. Div. 103.

No presumption from disinheritance.

The disinheritance of an heir or next of kin, even if unaccounted for, presents no ground for contest unless marked by fraud, deceit or unfair influence, so that the act is really that of another and not of testator. *Matter of Arensberg*, 120 App. Div. 463, 104 N. Y. Supp. 1033.

Presumption of undue influence from adulterous intercourse.

There is no presumption of law that unlawful relations between a man and woman cause undue influence in making a will. *Platt v. Elias*, 186 N. Y. 374.

In *Matter of Coffin*, 81 Misc. Rep. 391, the surrogate refused to find against a will, although made in favor of testator's mistress, upon wholly circumstantial evidence, where undue influence was alleged.

Undue influence must be proved by the party asserting it. The fact that two persons were living together as husband and wife, although not married, does not change the rule. *Matter of Powers*, 176 App. Div. 455, 162 N. Y. Supp. 828.

Evidence of the condition and value of the estate and of each legacy may be given.

While a testator may do what he will with his own, when the question is whether the will is the result of undue influence it would seem to be always material to ascertain the value of the several testamentary gifts found in the will. *Matter of Woodward*, 167 N. Y. 28; revg. 52 App. Div. 494, 65 N. Y. Supp. 405.

Declarations of the deceased showing unsoundness of mind are competent upon that issue. *Matter of Woodward*, 167 N. Y. 28; revg. 52 App. Div. 494, 65 N. Y. Supp. 405.

¶ 60 Undue Influence; Legacy to Draftsman, Attorney or Clergyman.

Legacy to a draftsman of the will; character of proof required.

The principles and the rule were laid down in *Matter of Will of Smith* (95 N. Y. 516, 522, 523). The court in that case said that the relation in which the parties to a transaction stand to each other is often a material circumstance, and may of itself in some cases be sufficient to raise a presumption of the existence of undue influence. It was then added as follows: "The rule to which we have adverted seems, however, to be confined to cases of contracts or gifts *inter vivos*, and does not apply, in all of its strictness, at least, to gifts by will. It has been held that the fact that the beneficiary was the guardian, attorney, or trustee of the decedent does not alone create a presumption against a testamentary gift, or that it was procured by undue influence. *Coffin v. Coffin*, 23 N. Y. 9; *aff'g*, 26 Hun 187; *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689; *Parfitt v. Lawless*, L. R., 2 Pro. & Div. 462. The mere fact that the proponent was the attorney of the testatrix did not, according to the authorities cited, create a presumption against the validity of the legacy given by her will. But, taking all the circumstances together — the fiduciary relation, the change of testamentary intention, the age and mental and physical condition of the decedent — the fact that the proponent was the draftsman and principal beneficiary under the will and took an active part in procuring its execution, and that the testatrix acted without independent advice, a case was made which required explanation and which imposed upon the proponent the burden of satisfying the court that the will was the free, untrammelled, and intelligent expression of the wishes and intentions of the testatrix." *Matter of De Vangrigneuse*, 46 Misc. Rep. 49, 51.

Again it has been said that when a person of advanced years and infirm mentally and physically has made his attorney the principal beneficiary, and it appears that this was

contrary to previously expressed testamentary intentions, that the attorney was a draftsman of the will and took an active part in procuring its execution and that the testator acted without independent advice, the burden is imposed upon the attorney of satisfying the court that the will was the free, intelligent expression of the intention of the testator. *Matter of Smith*, 95 N. Y. 517; *Matter of Rintelen*, 77 App. Div. 142, 78 N. Y. Supp. 1092; *Matter of Gallup*, 43 App. Div. 437, 60 N. Y. Supp. 137.

The will by a client in favor of his lawyer is viewed with great suspicion by the courts. *Marx v. McGlynn*, 88 N. Y. 357.

The fact that a beneficiary gives the directions or dictation for the making of a will excites the greatest suspicion against it and an additional burden is cast upon the proponent to show by the clearest and most satisfactory proof that it is the will of the testator. *Delafield v. Parish*, 25 N. Y. 9, 35.

Where a will has been prepared or procured by one interested in its provisions, an additional burden is imposed upon those who seek to establish it; all circumstances are regarded by the court with suspicion and jealousy and there must be stronger proof than would else have been required that the paper propounded expresses the free, unbiased testamentary purpose of the alleged testator, and not merely the wishes of the interested beneficiary. *Estate of Peck*, 10 N. Y. St. Repr. 698.

If a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court and call upon it to be vigilant and zealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased. *Newhouse v. Goodwin*, 17 Barb. 236; *Matter of Eckler*, 47 Misc. Rep. 320, 95 N. Y. Supp. 986.

No presumption where attorney is named as executor or trustee.

There is no authority in this State for the proposition that the naming of an attorney or confidential adviser as an executor is a suspicious circumstance or one which raises a presumption of undue influence. Such an act does not operate to change the general rule that the burden of proving undue influence is upon the party asserting it and that it must be established by clear and convincing evidence. It has been held in this State that even where the draftsman of a will is a beneficiary, the fact would raise no presumption to overthrow the will. In *Post v. Mason* (91 N. Y. 539) it was held that where a will contained a legacy to the draftsman, an attorney who, at the time of the execution of the will was, and for a long time previously had been, the counsel of the testator, the fact did not raise a presumption that the influence of the attorney was unduly exercised, or that the intention of the testator was improperly controlled. In *Matter of Smith* (95 N. Y. 516) the court said (p. 523): "It has been held that the fact that the beneficiary was the guardian, attorney or trustee of the decedent, does not alone create a presumption against a testamentary gift, or that it was procured by undue influence. (*Coffin v. Coffin*, 23 N. Y. 9; *Post v. Mason*, 91 id. 539, 43 Am. Rep. 689.) In *Haughian v. Conlan* (86 App. Div. 290) the court held that the fact that the lawyer who drew the will was bequeathed legacies was utterly insufficient to warrant the inference that the will was the result of undue influence. See, to the same effect, *Clarke v. Schell*, 84 Hun, 28, 31 N. Y. Supp. 1053, 65 N. Y. St. Repr. 83; *Matter of Suydam*, 84 Hun, 414, 32 N. Y. Supp. 449, 65 N. Y. St. Repr. 733; aff'd, on opinion below, 152 N. Y. 639; *Matter of Malor*, 121 App. Div. 398; revg. 52 Misc. Rep. 263; *Matter of Thompson*, 121 App. Div. 470; revg. 50 Misc. Rep. 222, 100 N. Y. Supp. 492.

While the fact that a draftsman of a will is made executor and beneficiary justly excites suspicion of fraud and undue influence, it is not a rule or principle of law that he cannot be

an executor or take a benefit, and the suspicion may be overcome. *Nexsen v. Nexsen*, 2 Keyes, 229, 3 Abb. Ct. App. Dec. 360.

¶ 61 Knowledge of Contents Where Will is Signed by Mark; Allegations of Fraud and Deceit.

Allegations of fraud, conspiracy and deceit.

Where fraud and conspiracy are charged in a testamentary cause it is generally conceded that the party alleging it has a latitude hardly to be conceded in other causes involving only the *factum* of will. When fraud is charged, it is difficult to say that any facts bear too slightly on the issue, if they bear at all. The precise mode of committing the fraud need not be proved, if the circumstances actually proved raises a legitimate presumption of fraud. *McLaughlin v. McDevitt*, 63 N. Y. 213, 220; *Matter of Gannon*, 73 Misc. Rep. 325, 132 N. Y. Supp. 712.

Where a marriage took place with testator at a time when the woman was incompetent to contract marriage, and she practiced fraud and deception upon the testator and but for such fraud and deception the will in question would not have been made, probate was denied. *Tilby v. Tilby*, 2 Dem. 514.

The declarations of the testator subsequent to making the will are improper and incompetent as affirmative statements of facts to prove fraud and collusion. *Gick v. Stumpf*, 204 N. Y. 413; *Marx v. McGlynn*, 88 id. 357; *Burnham v. Brennan*, 74 id. 597; *Kelly v. Home Sav. Bank*, 103 App. Div. 141; *Tierney v. Fitzpatrick*, 195 N. Y. 433; *Conkling v. Weatherwax*, 181 id. 258; *Schepps v. Bowery Sav. Bank*, 97 App. Div. 434; *Shailer v. Bumstead*, 99 Mass. 112; *Lane v. Moore*, 151 id. 87; *Throckmorton v. Holt*, 180 U. S. 552; *Abbott's Trial Evidence* (2d ed.), 147; *Wigmore on Evidence*, § 1738.

Statements made by a testator tending to impeach a will previously made are too unreliable to be admissible as a basis for setting aside an instrument made under the formalities required by statute. Such statements may be made for the

express purpose of deception or to satisfy impertinent curiosity and importunity or to express agreement with the suggestions of the questioner and thus satisfy the one to whom the declaration is made, or they may spring from a semi-morbid condition that in no way reflects the condition of mind or the purpose of the testator at the time the will was actually executed. *Smith v. Keller*, 205 N. Y. 39.

Proof of knowledge of contents. See ¶ 63.

Upon probate there should be evidence that the decedent could read the alleged will or that the contents thereof was made known to him. *Cadmus v. Oakley*, 2 Dem. 298.

Where there are no circumstances showing want of good faith, it is not necessary to prove that the testator gave the instructions for the will, that he read it, that it was read to him, or that he was acquainted with its contents at the time of the execution. *Matter of Hall*, 5 Misc. Rep. 461, 24 N. Y. Supp. 864; *Matter of Seagrist*, 153 N. Y. 682; aff'g, 1 App. Div. 615, 73 N. Y. St. Repr. 88, 37 N. Y. Supp. 496, which aff'd, 11 Misc. Rep. 188, 66 N. Y. St. Repr. 549, 32 N. Y. Supp. 1095.

Knowledge of contents will be presumed where a draft of the will was given to testator which he retained until his death. *Matter of Rohe*, 22 Misc. Rep. 415, 50 N. Y. Supp. 392.

Where testator is able to read writing and is of sufficient capacity to transact business, it may be inferred from the circumstances that the testator was acquainted with its contents. *Matter of Metcalf*, 16 Misc. Rep. 180, 38 N. Y. Supp. 1131.

Where a lawyer drawing the will reads it to the testator, it will be presumed that he read the whole will correctly, and that testator knew the contents. *Matter of Murphy*, 15 Misc. Rep. 208, 72 N. Y. St. Repr. 758, 37 N. Y. Supp. 223.

Declarations of testator are competent showing that he understood that he had made a will and knew its contents. *Matter of Corcoran*, 145 App. Div. 129, 129 N. Y. Supp. 165.

Proof of knowledge of contents where will is signed by mark. See ¶ 37.

Before a will, which is signed by the mark of the testator, can be admitted to probate there should be proof that the testator knew the contents of the will.

Where there is no contest this proof is usually made by adding to the formal deposition of the witnesses a statement on the part of both or one of the witnesses, as the case may be, to the effect that before the execution of the said paper propounded as the will of the deceased the contents of the same were truly and fully made known to the deceased. Where neither of the subscribing witnesses can testify to such a fact, affidavit of the person who can testify to such fact should be filed with the deposition of the witnesses.

Proof where signature is by mark and one witness is dead.

Where a will is executed by mark and one of the attesting witnesses dies, the testimony of the other subscribing witness or of any other witness present at the time may furnish sufficient proof of the handwriting of the testator together with other facts which will convince the surrogate of the due execution of the will and of the absence of fraud.

Will signed by mark — one witness dead — surviving witness did not see mark made — no other proof of making of mark — probate denied. *Matter of Porter*, 1 Misc. Rep. 262, 54 N. Y. St. Repr. 239, 22 N. Y. Supp. 1062; *Worden v. Van Gieson*, 6 Dem. 237; aff'd, 47 Hun, 5, 14 N. Y. St. Repr. 117; disap'g, 20 N. Y. Supp. 123.

Will signed by mark — one witness dead — the man who drew the will, not himself a witness, testified to seeing the mark made — *held* sufficient. *Matter of Smith*, 39 N. Y. St. Repr. 698, 15 N. Y. Supp. 424.

Surviving witness testified that he saw deceased make the mark — *held* sufficient. *Matter of Murphy*, 15 Misc. Rep. 208, 72 N. Y. St. Repr. 758, 37 N. Y. Supp. 223; *Matter of Dockstader*, 6 Dem. 106, 19 N. Y. St. Repr. 245; foll'd, in 20 N. Y. Supp. 123; *Matter of Hyland*, 58 N. Y. St. Repr. 798, 27 N. Y.

Supp. 961; *Matter of Wilson*, 76 Hun, 1, 58 N. Y. St. Repr. 732, 20 N. Y. Supp. 957.

The foregoing authorities have overruled the following decisions, where it was held that, where no one but the surviving subscribing witness can testify to the making of the mark, the will cannot be proved. *Matter of Reynolds*, 4 Dem. 68; dist'd, in 6 Dem. 107, 19 N. Y. St. Repr. 245; dist'd, in 20 N. Y. Supp. 123; foll'd, in 6 Dem. 240; *Matter of Phelps*, 22 N. Y. St. Repr. 896, 16 Civ. Pro. 424, 5 N. Y. Supp. 270.

Proof where signature is by mark and both witnesses dead.

Where the witnesses to a will signed by mark were both dead, the will was admitted upon proof of the signature of the witnesses, there being a full attestation clause and no suspicious circumstances or contradictory evidence. *Matter of Foley*, 55 Misc. Rep. 162, 106 N. Y. Supp. 474; *Matter of Corcoran*, 145 App. Div. 129, 129 N. Y. Supp. 165.

Expert testimony as to whether a testator made the signature by mark, need not be received as there generally would be no standard of comparison, and a "mark" is not a writing under the statute (ch. 36, L. 1880, ch. 555, L. 1888) permitting the comparison of writing. *In re Caffrey*, 174 App. Div. 398, 161 N. Y. Supp. 277, aff'd, 221 N. Y. 486.

¶ 62 Burden of Proof; Effect of Attestation Clause.

Burden of proof.

In every case the *onus probandi* lies on a party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will and testament of a free and capable testator. *Lake v. Ranney*, 33 Barb. 49; *Matter of Elster*, 39 Misc. Rep. 63, 78 N. Y. Supp. 871; *Matter of Barbineau*, 27 Misc. Rep. 417, 59 N. Y. Supp. 375.

A distinction must be made between the "burden of proof" and the "burden of evidence." Both are used for the time being where the proponents have established the

factum of the will. The burden of evidence then is upon the contestants to overcome the proof made by the proponents, and until they do so the surrogate will not deny probate on mere inference or conjecture. *Matter of Sperb*, 71 Misc. Rep. 378, 130 N. Y. Supp. 122.

It was said by one of the most distinguished probate judges of modern times that the burden of proof in probate proceedings is always on proponents. *Crispell v. Dubois*, 4 Barb. 393, 397; *Hoyt v. Jackson*, 2 Dem. 443; aff'd, 112 N. Y. 493. This burden never shifts throughout the entire proceeding; otherwise many of the decisions casting additional burdens or degrees of proof, on proponents under certain circumstances prescribed, would be useless distinctions. The contrary doctrine if intended to be announced in *Parish v. Delafield*, 25 N. Y. 9, 97, has been certainly qualified in other decisions more directly in point. The burden of taking up the evidence on an affirmative plea, or an exception to probate, of course, rests in the first instance with contestants, and that is all that is generally meant by stating that the burden of proof is shifted or that it is on contestants in probate causes. *Matter of Martin*, 98 N. Y. 193. When contestants have furnished their affirmative evidence, the proponents' adminicular proofs, or those in support of the probate, are in order. *Taylor Will Case*, 10 Abb. Pr. (N. S.) 300. But the *onus probandi* is always on proponents of a will and it never shifts throughout the cause. This great rule of probate jurisdictions is reinforced by several provisions of the Statute of Wills and procedure thereon. § 144, Sur. Ct. A.; Decedent Estate Law, §§ 10, 15; *Matter of Schreiber*, 112 App. Div. 495; aff'd, 185 N. Y. 610; *Matter of Goodwin*, 95 App. Div. 183, 88 N. Y. Supp. 734; *Matter of Mooney*, 73 Misc. Rep. 315, 323, 132 N. Y. Supp. 705.

Burden of proof; insanity at a particular time established.

Where the evidence clearly shows that at a time prior to the making of the will, the testator was not of disposing mind, the burden is cast upon the proponents of showing that the

testator thereafter recovered from such condition, or executed the will in a lucid interval. *Matter of Van Den Heuvel*, 76 Misc. Rep. 137, 136 N. Y. Supp. 1109.

Proof where genuineness of signature is attacked.

Where an issue is made as to the genuineness of the signature of the testator, the burden is upon the proponents to convince the surrogate that the signature is not a forgery. *Matter of Burtis*, 43 Misc. Rep. 437, 89 N. Y. Supp. 441.

Effect of attestation clause.

The certificate of attestation signed by a deceased witness is evidence to some extent of the facts stated in it, but the force of this evidence will depend much upon the circumstances of the particular case. *Orser v. Orser*, 24 N. Y. 51.

Where the witnesses are dead, where they are forgetful, or when they are hostile, an attestation clause adds weight to slight evidence of regular execution, but where the testimony of the witnesses shows what actually took place, the presence or absence of an attestation clause can have little, if any, weight. *In re Kenney*, 179 App. Div. 258, 166 N. Y. Supp. 478, *Wooley v. Wooley*, 95 N. Y. 231.

Reading attestation clause after execution — *held* to assist evidence of publication. *Von Hoffman v. Ward*, 4 Redf. 244.

While the attestation clause is not evidence it is a signed recital from which courts may infer that the statutory requirements were complied with, as the presumption will not be indulged that a reputable witness would have so signed unless the clause was true, and probate is based on the truth of that inference. *Matter of Briggs*, 47 App. Div. 47, 62 N. Y. Supp. 294. *Losce v. Losce*, 2 Hill, 609, 612; *Matter of Hesdra*, 119 N. Y. 615, 617.

Proof where both witnesses are dead. See also ¶ 49.

The same rule applies in the case of deceased subscribing witnesses. Judge Ruger, in the *Hesdra* case, said: "Proof of the signature of a deceased subscribing witness is pre-

sumptive evidence of the truth of everything appearing upon the face of the instrument relating to its execution, as it is presumed the witness would not have subscribed his name in attestation to that which did not take place.”

A full attestation clause, proof of signatures of witnesses and testator and no suspicious circumstances, make a *prima facie* case for probate, although the witnesses may have forgotten the transaction. *Matter of Sizer*, 129 App. Div. 7, 113 N. Y. Supp. 210; *Matter of Francis*, 73 Misc. Rep. 148, 132 N. Y. Supp. 695; *Matter of Rosenthal*, 100 Misc. Rep. 84, 164 N. Y. Supp. 1060.

No attestation clause, both witnesses dead.

While an attestation clause is not necessary, it aids the proponent materially when both witnesses are dead, for by it some evidence is made of the due and formal execution of the will. Without it, in cases where the witnesses are dead, it may be very difficult to obtain the evidence of “such other circumstances as would be sufficient to prove the will upon the trial of an action.” Proof of signatures only will not make due proof in such cases, but additional evidence must be found which tends to show that the will was made and executed, and was in some way recognized by the testator. *Matter of Abel*, 136 App. Div. 788; *Matter of Ellery*, 139 App. Div. 244. *Matter of Oliver*, 13 Misc. Rep. 466.

On appeal decree of the surrogate denying an application to revoke a holographic will without attestation clause, there being no proof except that of the handwriting of the will and of the signatures, was reversed. *Matter of Ellery*, 139 App. Div. 244, 123 N. Y. Supp. 1015.

Even though there be no attestation clause and no direct proof of the facts of execution, yet other circumstances may be sufficient to make the proof required by the statute. *Matter of Abel*, 136 App. Div. 788, 121 N. Y. Supp. 452.

CHAPTER XVII.

Decree of Probate; When Granted and Its General and Special Contents.

- ¶ 63. § 144. Probate not allowed unless surrogate satisfied.
 Whom the decree binds.
 When will sufficiently proved.
 Presumption of knowledge of contents, validity and sanity.
 Decree by consent.
- ¶ 64. Decree should specify what alterations are or are not probated as part of the will.
- ¶ 65. Decree should determine whether another paper referred to is or is not incorporated in the will as probated.
 Proof of will republished by codicil.
- ¶ 66. Decree should reject slanderous and libelous statements.
 § 154. Decree may revoke prior letters issued, and direct letters to issue to a person entitled upon a contingency.
 Decree when will is in a foreign language, and recording of such will.
 Decree probating will as to real or personal property, or both.
- ¶ 67. Effect of decree upon contents of will probated.

¶ 63 Decree of Probate.

Probate not allowed, unless surrogate satisfied, etc.

Before admitting a will to probate, the surrogate must inquire particularly into all the facts and circumstances, and must be satisfied with the genuineness of the will, and the validity of its execution.

If it appears to the surrogate that the will was duly executed; and that the testator, at the time of executing it, was in all respects competent to make a will and not under restraint; it must be admitted to probate as a will valid to pass real property, or personal property, or both, as the surrogate determines, and the petition and citation require, and must be recorded accordingly. The decree admitting it to probate must state whether the probate was or was not contested.

§ 144, *Sur. Ct. A. Former* § 2614, *Code Civ. Pro.*

Decree after trial by jury. See ¶ 31.

Where the trial is by the surrogate and a jury, the surrogate has the same right as any other judge has to set the verdict aside if he is convinced that it is not in accordance with the evidence or the law. He must, under section 144, be satis-

fied that the will is entitled to probate, and so the verdict of the jury is not conclusive upon his conscience, if against the weight of evidence, or procured by passion or prejudice. When, however, the trial by jury is removed from the Surrogate's Court to the Supreme Court, the responsibility of accepting or rejecting the verdict of the jury is put upon the trial judge, and when a verdict is certified back to the surrogate, he must enter a decree in accordance therewith. *In re Plate's Will*, 156 N. Y. Supp. 999; *Matter of Eno*, 157 N. Y. Supp. 553; *Matter of Dorsey*, 157 N. Y. Supp. 662, 94 Misc. Rep. 566; *In re Dunn*, 158 N. Y. Supp. 119, 94 Misc. Rep. 528, aff'd, 180 App. Div. 862.

Decree binds whom.

The decree of probate binds only such persons as shall have been cited, or who have made themselves parties, or who have been notified in case of contest. See ¶ 52.

Where a party not cited appears and claims an interest, and to determine that question it is necessary to construe the will, the party so appearing is bound by the decree. *Matter of Wheeler*, 32 App. Div. 183, 52 N. Y. Supp. 943; aff'd, 161 N. Y. 652.

A person interested in a codicil who was not a party to a probate proceeding in which the codicil was refused probate is not bound by such decree, and may present the codicil for original probate. *Matter of Tilden*, 56 App. Div. 277, 67 N. Y. Supp. 879.

Binds legatees who had no formal notice but who appeared and took part in the contest. *Cook v. White*, 43 App. Div. 388, 60 N. Y. Supp. 153; aff'd, 167 N. Y. 588.

Probate by action.

Probate by action under former section 2653a, after a preliminary probate in surrogate's court, no longer exists as to wills probated after September 1, 1914. Where the will was probated before that date, there was a right of action given for two years from the date of probate, and section 93 of the

General Construction Law saves such right which has accrued. No doubt the right of an absentee, or incompetent person is also saved, as such person was not restricted in his right to bring such action within two years by section 2653a.

To this extent the probate of a will in Surrogate's Court is not binding upon infants, incompetents and absentees, where such probate was had before September 1, 1914, when section 2653a was repealed.

Decree rejecting will.

The decree of the surrogate rejecting a will after a contest upon the merits is conclusive upon the parties to the probate proceeding in all controversies relating to the personal estate: *Matter of Goldsticker*, 192 N. Y. 35, aff'g, 123 App. Div. 474.

Decree is conclusive as to real property, and binds the devisee if he was a party. See ¶ 33.

Before the year 1910 the decree of the surrogate's court upon proof of a will was not conclusive as to real property, or against a devisee.

In that year section 2625, Code of Civil Procedure, was amended, making probate conclusive as to a will of both personal and real property, and sections 2626 and 2627, making a distinction as to the effect of a decree upon the two classes of property, were repealed.

The revision of 1914 went still further, and by giving the right to the heir or devisee to have a jury trial of the validity of the will effectually cut off his right to again try the same issue in another court. See § 80, ¶ 33.

When sufficiently proved. See ¶ 37.

It must appear:

- a. That the will was duly executed;
- b. That the testator, at the time of executing it, was in all respects competent to make a will;
- c. Was not under restraint.

When thus proved to the satisfaction of the surrogate the will must be admitted as a will valid to pass real property or personal property, or both as the circumstances require.

The decree must state whether or not the probate was contested.

The phrase "if it appears to the surrogate," as used in section 144, implies that there must be some evidence given tending to show that the person who made the will was competent to make it, and at the time of its execution not under restraint. Evidence is the only way by which a fact can be made "to appear" to one acting in a judicial capacity. This must be so, otherwise there would be no way of reviewing an official act. This section, therefore, is equivalent to a positive requirement that the fact of competency must be established in the first instance by sufficient evidence by the proponents of a will. This is usually done by the subscribing witnesses (*Miller v. White*, 5 Redf. 320) inasmuch as the proponent has the affirmative of the issue (*Matter of Cottrell*, 95 N. Y. 329; *Matter of Freeman*, 46 Hun, 458), and unless it be done, probate should be refused (*Matter of Goodwin*, 95 App. Div. 183, 88 N. Y. Supp. 734). Indeed, if there could have been any doubt upon the subject, it was removed by *Matter of Ramsdell* (16 N. Y. St. Repr. 281), where probate was denied upon this express ground and the decree of the surrogate was affirmed by the late General Term (20 N. Y. St. Repr. 446) which in turn was affirmed by the Court of Appeals (117 N. Y. 636). And to the same effect is *Matter of Goodwin* (*supra*) and *Kingsley v. Blanchard* (66 Barb. 317).

Where there is no attestation clause and both witnesses are dead there should be other proof than the genuineness of the signatures. *Matter of Neary*, 61 Misc. Rep. 557, 115 N. Y. Supp. 971.

The better opinion is that if, upon the whole case presented, the judicial conscience is in grave doubt as to whether or not the testator was mentally sound, that doubt must be resolved in favor of the contestant. *Matter of Barbineau*, 27 Misc. Rep. 417, 59 N. Y. Supp. 375; *Knapp v. Reilly*, 3 Dem. 427.

Presence of competent lawyer may be considered.

The fact that a competent lawyer was present and directed the execution of a will may be considered in determining whether a will was properly executed. *Matter of Francis*, 73 Misc. Rep. 148, 132 N. Y. Supp. 695. *Matter of Kindberg*, 207 N. Y. 220.

General requirements.

This section gives new sanction and approval to the doctrine of *Delafield v. Parish* (25 N. Y. 9, 34), which lays down the rule that the surrogate must be satisfied that the paper propounded declares the will of the deceased and that he was of sound mind. *Cooper v. Benedict*, 3 Dem. 136.

It should be borne in mind that less capacity is required to enable a man to make a valid will than to enter into and make other valid contracts. *Matter of Seagrist*, 1 App. Div. 615, 37 N. Y. Supp. 496. The reason for this rule is apparent: the will is not a contract; it usually represents the last wish, if not act, of the one departing; if it is attacked he is not here to defend his act, or give a reason for it. *Clapp v. Fullerton*, 134 N. Y. 197; *Matter of Blossom*, —A. D. —, 186 N. Y. Supp. 782.

Living or dying a person is not prohibited from indulging his passions, prejudices, or caprices and his will is not to be thwarted or discarded by the demand of any tribunal, whether of law or equity, because such dispositions are by them deemed unreasonable or prompted by passions, prejudices, or other motives. *Marvin v. Marvin*, 3 Abb. Ct. App. Dec. 192, 4 Keyes, 9.

It is well established that when the surrogate is not judicially satisfied that the will was properly executed or that it speaks the true intention of the testator or that at the time of executing it he was in all respects competent to make a will and not under restraint, then the court is bound to pronounce his opinion that the instrument is not entitled to probate. *Delafield v. Parish*, 25 N. Y. 9, 35; *Lee v. Dill*, 11 Abb. Pr. 214; *Matter of Clausmann*, 5 N. Y. St. Repr. 329.

Witness unable to speak the language of testator.

Great care should be exercised in admitting a will to probate where the witness could not understand the language of the testator, and has to have it repeated by an interpreter. Other proof of the declarations of the testator should be made in such a case. *Stein v. Wilzinski*, 4 Redf. 441.

Lapse of time no bar. See ¶ 74.

There is no rule of law and no statute in this State which prevents the probate of a will, no matter how great the lapse of time from the death of the testator. It was held by the Supreme Judicial Court of Massachusetts that a will should be probated sixty-three years after the death of the testatrix, and that the fact that she made a will was some evidence of her legal capacity. *Haddock v. Boston & Maine Railroad*, 146 Mass. 155; *Matter of Duffy*, 127 App. Div. 174, 111 N. Y. Supp. 491.

A long delay in offering a will for probate may, when not satisfactorily explained, arouse suspicion and add to the burden imposed upon the proponents. *Matter of Duffy*, 127 App. Div. 174, revg. 51 Misc. Rep. 544.

Will more than thirty years old.

Where a will is more than thirty years old, both witnesses are dead, its proper custody is shown and its appearance is honest, the rule as to ancient documents may be considered to strengthen the little testimony available. *Matter of Hall's Will*, 90 Misc. Rep. 216, 154 N. Y. Supp. 317; *Jackson v. Laro-way*, 3 Johns. Cas. 283; *Clark v. Owens*, 18 N. Y. 434; *Fetherly v. Waggoner*, 11 Wend. 603; *Northrop v. Wright*, 24 Wend. 221; *Wilson v. Betts*, 4 Den. 201; *Burhans v. Blanshan*, 3 Johns. 292, 3 Am. Dec. 485; *Jackson v. Luquere*, 5 Cow. 221.

Presumption of knowledge of contents. See ¶ 61.

The signature of a competent testator to his will ought to be and is regarded by the courts as evidence that it is his deliberate act, and that he would not have placed his name to an

instrument which does not express his testamentary intention, and from this fact alone he is deemed to have known its contents, to have understandingly executed the same and been aware of the legal effect thereof. *Matter of Sheldon*, 1 Pow. Sur. Rep. 10; aff'd, 65 Hun, 623, 141 N. Y. 559.

Presumption of validity.

The notion prevails among many people that a will can be set aside when all the relatives are not, to some extent, benefited by it. "A man's testamentary disposition of his property is not invalidated because its provisions are unequal, or unjust, or the result of passion, or of other unworthy or unjustifiable sentiments. It is natural, and, therefore, usual, to make provisions for a child; but, under our governmental institutions, no obligation to do so is imposed upon the parent, and the presumption of validity is not affected by the failure to do so, alone. Nor is the presumption in favor of a will overcome by showing that the testator was of advanced age or of enfeebled condition of mind or body." *Dobie v. Armstrong*, 160 N. Y. 584, 55 N. E. 302; *Matter of Armstrong*, 106 N. Y. Supp. 671, 55 Misc. Rep. 487. *Matter of McCabe*, 75 Misc. Rep. 35, 134 N. Y. Supp. 682.

Death bed wills.

The testamentary act in making a death bed will is subject to closer scrutiny than in other cases. No legal inference against the testamentary paper conclusively flows from the single fact that it is what is called a death bed will. *Matter of Knight's Will*, 150 N. Y. Supp. 137, 87 Misc. Rep. 577.

While the fact that a will is made at a time when the alleged testator is upon his death bed does not of itself create a presumption of invalidity (*Matter of Seagrist*, 1 App. Div. 615, 620, 37 N. Y. Supp. 496), it should make the surrogate more careful in scrutinizing the document than if it was executed by a person in full possession of bodily health, attending to the normal duties of everyday life. *Matter of McGraw*, 9

App. Div. 372, 380, 41 N. Y. Supp. 481; *Rollwagen v. Rollwagen*, 63 N. Y. 504, 518; *In re King's Will*, 89 Misc. Rep. 638, 154 N. Y. Supp. 238.

Presumption of sanity.

Undoubtedly there is a presumption, mostly one of fact, that every man is sane, and that presumption materially assists the proponent in carrying the burden that is upon him, but it does not relieve him of it. *Matter of Barbineau*, 27 Misc. Rep. 417, 59 N. Y. Supp. 375.

There is no presumption of sanity in a proceeding to admit a will to probate, and the burden of proof as to testamentary capacity is always upon the proponent. *Matter of Widmayer*, 34 Misc. Rep. 439, 69 N. Y. Supp. 1014; *aff'd*, 74 App. Div. 336, 77 N. Y. Supp. 663.

It is undoubtedly true that there is a presumption, partly of law and partly of fact, that every man is sane. But this presumption is not enough to be the basis of a finding that a testator, at the time an alleged will was made, was competent to make it and not under any restraint. *Matter of Schreiber*, 112 App. Div. 497; *app. dismissed*, 185 N. Y. 610.

Proof of typewritten will.

The practice of typewriting wills was at an early time condemned by the surrogate of Kings county, because of the ease of alteration. In the New York Law Journal a correspondent suggested that the following simple precautions would obviate these objections:

“(1) Have the testator sign at bottom of each page.

“(2) Have the typewriting free of erasures or interlineations, with all blank space ruled off.

“(3) Recite in the intestimonium clause the facts.

“(a) That the will is contained on so many sheets of paper.

“(b) That the testator has subscribed his name at the bottom of each sheet thereof, and ‘to this, the last sheet thereof, he has hereto subscribed his name and affixed his seal,’ etc.”

Before admitting a typewritten will to probate the surrogate should carefully examine it, and if there appear to have been alterations or the substitution of pages, he should require proof concerning them and be satisfied that the paper is presented in its original form. While the practice of typewriting wills is now almost universal, these suggestions are of value.

May be admitted against the testimony of one or all of the subscribing witnesses.

The publication of a will established upon the testimony of one of the attesting witnesses in opposition to the other. *Trustees, etc. v. Calhoun*, 25 N. Y. 422.

The fact that testator knew the paper to be his will may be established against the testimony of all the subscribing witnesses. *Trustees, etc. v. Calhoun*, 25 N. Y. 422.

The positive testimony of the subscribing witnesses that some of the necessary acts were not performed may be overcome by other testimony. *Matter of Cottrell*, 95 N. Y. 329.

Will admitted against the oral testimony of the subscribing witnesses that the signature was not made in their presence or acknowledged. *Matter of Fitzgerald*, 33 Misc. Rep. 325, 68 N. Y. Supp. 632; *Matter of Kellum*, 52 N. Y. 517.

Failure of recollection of witnesses.

Witnesses forgetting the act, but testifying to their signatures to a full attestation clause and that they would not have signed it unless what was stated there had been true, held sufficient. *Matter of Pepoon*, 91 N. Y. 255; *In re Brissell*, 16 App. Div. 137, 45 N. Y. Supp. 122; *In re Carey*, 24 App. Div. 531, 49 N. Y. Supp. 32.

Where the witnesses have forgotten the transaction the will may still be admitted if there is a full attestation clause or other satisfactory evidence. *Matter of Sears*, 33 Misc. Rep. 141, 68 N. Y. Supp. 363.

Failure of recollection not sufficient to cause denial of probate. *Brown v. Clark*, 77 N. Y. 369, aff'g, 16 Hun, 559.

When mere proof of due observance of the formalities of subscription and publication will not justify decree of probate. *Hyatt v. Lunnin*, 1 Dem. 14.

An attestation clause, one witness dead, the other having no recollection of the occurrence, proof of signature of dead witness and of testator,—*held* valid execution. *Rolla v. Wright*, 2 Dem. 482.

Decree dismissing proceedings or rejecting will by consent.

If all parties, being of full age and competent, should ask that probate proceedings be dismissed, or if all such parties formally admit that the will was not legally executed, the surrogate may order or decree accordingly. *Matter of Lasak*, 131 N. Y. 624, *aff'g*, 57 Hun, 417, 32 N. Y. St. Repr. 955, 10 N. Y. Supp. 844.

It must, however, be in a very unusual case that the surrogate permits the parties to dismiss a proceeding for probate by consent. If that is allowed the surrogate should require that the will remain on file in his court.

¶ 64 Effect of Alterations Appearing Upon the Face of the Will.

It is provided by section 34 of the Decedent Estate Law that “No will in writing, nor any part thereof * * * shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration and executed with the same formalities with which the will itself was required by law to be executed.” The effect of this statutory provision is to prevent a testator from altering his will, otherwise than by an instrument executed in the same manner as required to give it effect as a will. The statute has surrounded the execution of testamentary instruments with certain forms and ceremonies as a shield and protection against fraud and imposition; and the purpose of such precautionary measures might be entirely defeated, if held only to the original execution, leaving all subsequent alterations to be made without such protection. The

aim of the statute is to close the door against opportunities of fraud and alterations in a will, except by the observance of the same formalities as in its execution. *Matter of Kissam*, 59 Misc. Rep. 307, 110 N. Y. Supp. 158.

In *Lovell v. Quitman*, 88 N. Y. 377, it appears that, after the will was executed, the testatrix obliterated clauses numbered "2nd" and "4th" with intent to revoke the same. *Held*, that the obliteration was not effectual for that purpose, and that the will remained in full force and effect as before. In *Quinn v. Quinn*, 1 T. & C. 437, after the will was executed, the testator made alterations by erasing and interlining. *Held*, that the testator could not by an erasure partially revoke his will, and that the will should be probated as originally written.

In *Matter of Carver*, 3 Misc. Rep. 567, it was held that the effect of an unauthenticated erasure in a will after execution is to render the change sought to be made inoperative, leaving the will to stand in form and effect as before the alteration was attempted. In *Matter of Lang*, 9 Misc. Rep. 521, it was held that alterations and erasures, made after the execution of a will, will not invalidate it if the original intention of the testator can be ascertained.

Unattested alterations upon the face of a will must be presumed to have been made after its execution. *Wetmore v. Corryl*, 5 Redf. 544; *Dyer v. Erving*, 2 Dem. 160.

Where, after execution, a provision upon a slip of paper had been pasted upon the will — *held*, that probate should be allowed excluding the pasted provision. *Stevens v. Stevens*, 6 Dem. 262, 17 N. Y. St. Repr. 785; 3 N. Y. Supp. 131.

Where alterations appear on the face of a will and there is no indication of intent to revoke the whole will, probate of the will as originally written should be made. *Matter of Prescott*, 4 Redf. 178.

Changes and interlineations made in a will after its execution do not destroy the will as a whole, but an express declaration should accompany probate, enumerating each provision of the will annulled by such change or inter-

lineation. *Matter of Stickney*, 41 Misc. Rep. 70, 83 N. Y. Supp. 650.

Where an interlineation or erasure in a will is fair upon its face and is entirely unexplained, there being no circumstance whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution. *Matter of Voorhees*, 6 Dem. 162, 13 N. Y. St. Repr. 182; *Matter of Wood*, 144 App. Div. 259, 129 N. Y. Supp. 5.

Where there is an interlineation, fair upon the face of the instrument, there is no presumption that it is fraudulent, in the absence of any suspicious circumstances, and the burden of showing it to be fraudulent is on contestant. *Crossman v. Crossman*, 95 N. Y. 145, aff'g, 30 Hun, 385.

The validity of a will is not destroyed by the addition of a clause appointing an executor after the signature of the testator, provided such addition was made after execution. *Matter of Jacobson*, 6 Dem. 298, 19 N. Y. St. Repr. 262; *Brady v. McCrosson*, 5 Redf. 431.

Ink figures over pencil figures — *held* not to invalidate. *Matter of Tighe*, 24 Misc. Rep. 459, 53 N. Y. Supp. 718; modified in 50 App. Div. 628, 64 N. Y. Supp. 1149.

Where a clause has been cut out of a will, with no intention of revoking the will, and such clause can be proved as to its substance, the will should be admitted to probate as written. *Matter of Westbrook*, 44 Misc. Rep. 340, 89 N. Y. Supp. 862.

Alterations in various places in the will in the handwriting of testator — *held* not to indicate an intention to revoke the will. *Matter of Raisbeck*, 52 Misc. Rep. 279, 102 N. Y. Supp. 967.

Changes after signature and before publication.

It has even been held that words added by the draftsman at the direction of and in the presence of the testator and witnesses, the signature being thereupon acknowledged, does not incorporate such additions. *Matter of Foley*, 76 Misc. Rep. 168, 136 N. Y. Supp. 933; *Matter of McCaffrey*, 105 Misc. Rep. 433, 173 N. Y. Supp. 392.

Proof as to contents of missing parts of a will.

Statements of testator as to legacies he had given in and by his will are not competent to prove the purport of clauses cut from a will. *Matter of Kent*, 155 N. Y. Supp. 894, 169 App. Div. 388.

In construing a will the person who would benefit by a construction that a will had been changed before execution has the burden of proof to show such circumstances as would lead to that conclusion. *In re Ross*, 177 App. Div. 719, 164 N. Y. Supp. 884, revg. 96 Misc. Rep. 404, 160 N. Y. Supp. 518.

Decision and decree should state what, if any, changes or interlineations are allowed.

Where changes and interlineations appear upon the face of the will, the decision and decree should settle which, if any, of them are allowed to stand as a part of the probated will. If care is not taken to make such allowance or disallowance a part of the record the question may arise at any time as to the exact contents of the will as probated.

¶ 65 Incorporating Another Paper; Effect of Codicil to an Imperfectly Executed Will, or to One Rendered Inoperative by Law; Such Codicil May be Probated Although the Will to Which It Refers May Not be.

Incorporating another paper.

Many English decisions and those of many of our sister States give support to the proposition that extraneous unattested documents may be incorporated into a will by proper reference thereto. In this State, however, that doctrine does not prevail, and the rule is that no testamentary provision in other unexecuted or unattested papers can be incorporated into a will. *Cook v. White*, 43 App. Div. 388; aff'd, 167 N. Y. 588; *Matter of O'Neil*, 91 N. Y. 516; *Matter of Conway*, 124 id. 455, 460. In *Matter of Andrews* (43 App. Div. 394), the question was elaborately discussed, opinions being written by four of the justices taking part in the decision, and one of the

dissenting opinions was written in the expressed hope that the Court of Appeals might be attracted to a renewed consideration of the question and a modification of the rule. Such was not the result, however, for that decision was unanimously affirmed (162 N. Y. 1), and on review of the authorities the doctrine was reiterated.

A reason for not allowing the incorporation of another paper fastened to the will is that such paper may be taken off, and another substituted by testator, and thereby the will as it finally appears may not be the one executed. *Matter of Field*, 144 App. Div. 737.

Words of reference in a will will never suffice to incorporate the contents of an extraneous paper, unless it can be clearly shown that at the time such will was executed such paper was actually in existence. *Dyer v. Erving*, 2 Dem. 160.

Two papers each executed as a will are required to be executed — the first referring to the second. One admitted, the other rejected. *Matter of Sanderson*, 9 Misc. Rep. 574, 62 N. Y. St. Repr. 225, 30 N. Y. Supp. 848.

Another paper cannot be incorporated unless the will distinctly describes it as an existing paper. *Dennett v. Taylor*, 5 Redf. 561.

As a paper referred to in a will may under certain circumstances become a part of the will, oral testimony may be taken to identify and prove such paper. *Webb v. Day*, 2 Dem. 459; foll'g, 2 id. 160.

Where articles are given, described generally in accordance with a memorandum bearing even date with the will and such memorandum is never made, the articles do not pass. *Cramer v. Cramer*, 35 Misc. Rep. 17, 71 N. Y. Supp. 60.

Probate of duly executed paper, but not of one referred to but not duly executed.

Probate will not be refused to a paper properly executed as a will merely because it referred to and attempted to incorporate a distinct and separate paper not so executed. In *Matter of Sanderson* (9 Misc. Rep. 574), the surrogate of Orleans

county granted probate to a duly executed paper while denying it to one imperfectly executed, which was referred to therein and was intended by the testatrix to supplement and complete the duly executed paper. His decision is in harmony with the case of *Thompson v. Quimby*, 2 Bradf. 449; aff'd, 21 Barb. 107, and with the more recent case of *Matter of Emmons*, 110 App. Div. 701. The effect of references in wills to extraneous papers was considered in *Booth v. Baptist Church*, 126 N. Y. 215, 247, which was an action for the construction of a will, and it was held that a paper referred to in the will could not be treated as incorporated therein because, though testamentary in character, it was not executed as a will. The will in that case disposed of a very large estate, while the extraneous paper concerned a legacy of only \$10,000. No expression contained in the opinion lends the slightest support to the argument that probate should be refused, and it is scarcely conceivable that the court which delivered that opinion would have sustained an objection to the probate of the will then before it on that ground. *Matter of Reins*, 59 Misc. Rep. 126, 112 N. Y. Supp. 203.

Reference to will of husband made at same time does not incorporate such will. *Keil v. Hoehn*, 72 Misc. Rep. 255, 131 N. Y. Supp. 89.

Effect of codicil. See ¶ 39.

A properly probated and executed codicil referring to a defectively executed will does not validate the will and incorporate it into the codicil so that both papers are entitled to probate.

The rule, however, does not extend to a will properly executed and which has been rendered inoperative by law, as by marriage of a woman (*Brown v. Clark*, 77 N. Y. 369), or to one which was executed while the testator was of unsound mind or under restraint (*Cook v. White*, *supra*). In such case the instrument properly executed in form may be revived and validated by the proper execution of a codicil referring to such instrument, or made for that purpose.

Nor does the rule infringe upon the doctrine of revivor and republication of a validly executed will by the due execution and publication of a valid codicil. *Matter of Campbell*, 170 N. Y. 84. *Matter of Lawler*, — A. D. —, 185 N. Y. Supp. 726.

The codicil may be probated.

A codicil may modify the provisions of a will or supersede them entirely, or simply add to the disposition by introducing new beneficiaries. A validly executed will may have been lost and be incapable of proof, and yet the codicil, so far as it goes, is operative. *Newcomb v. Webster*, 113 N. Y. 191. A codicil executed according to the formalities of the statute is a final testamentary disposition, and if there be an existent and complete will, it takes it up and incorporates it. *Matter of Campbell*, 170 N. Y. 84. If, however, there be no such existent and validly executed will, and if the codicil be so complete in itself as to be capable of execution, then it must necessarily stand and be given the force of valid testamentary disposition. *Matter of Emmons*, 110 App. Div. 701, 96 N. Y. Supp. 506.

Where a prior will has been revoked, a paper published only as a codicil to that will at a time when the will was in existence, will not be probated as a will, nor as a codicil. *Matter of Nokes*, 71 Misc. Rep. 382.

Republishing by codicil does not mean that execution of codicil only need be proved. See ¶ 59.

Some question has arisen whether, where a codicil refers to a will and republishes it, proving the codicil will prove the will. An early case, *Matter of Nisbet*, 5 Dem. 286, seems to hold that doctrine, but the references to other cases are to cases construing the effect of republication upon legacies and devises. *Brown v. Clark*, 77 N. Y. 369, gives some support to the doctrine but is not directly in point.

In *Matter of Knapp*, 51 N. Y. St. Repr. 517, a revoked will was held to be revived by a codicil without re-execution.

In *Matter of Storms*, 3 Redf. 327, the will was produced but

both witnesses could not be produced, and on a codicil being proved, the will was considered sufficiently proved.

In *Matter of Weston*, 60 Misc. Rep. 275, 113 N. Y. Supp. 620; aff'd, 131 App. Div. 901, 115 N. Y. Supp. 1149, a will which could not be produced before the surrogate was not allowed to be proved by proof of the execution of the codicil.

In *Matter of Carll*, 38 Misc. Rep. 471, the surrogate said: "I believe the true rule to be, however, that a valid codicil can be called to the relief of the prior will only when the will was itself executed pursuant to statute."

The true distinction seems to have been made in *Matter of Emmons*, 110 App. Div. 701, 96 N. Y. Supp. 506, where the court held that a will which has been properly executed and revoked may be revived and republished by a codicil, but a will not shown to have been duly executed cannot be made a valid will by a duly executed codicil.

¶ 66 Decree; Contents.

Slanderous and libelous statements.

A will is an instrument which disposes of one's property, to take effect after death, and should not be permitted to be made a vehicle for libel or contumely, and when such design plainly appears from the context such matter, in so far as it is not dispositive, should be refused probate and record.

The same reasoning would apply to the opprobrious designation of a beneficiary in a will. A beneficiary ought not to be compeled to take a legacy *cum onere*. The opprobrious designation should not be probated or recorded, the dispositive words only should be admitted. *Matter of T. B.*, 1 Pow, Surr. Rep. 35, 18 N. Y. Supp. 214.

The jurisdiction of the surrogate to expunge or refuse to probate parts of a will claimed to be slanderous or libelous is fully discussed in *Matter of Meyer*, 72 Misc. Rep. 566, 131 N. Y. Supp. 27, and doubt is expressed as to the right of the surrogate to expunge any matter.

Decree should direct letters to issue.

It is a custom of long standing in probate courts to insert in the decree of probate, a direction that letters testamentary issue to the nominated executor, unless objections have been filed to grant of letters to such person. *In re Kennedy*, 106 Misc. Rep. 216, 174 N. Y. Supp. 429.

Decree granting probate must revoke prior letters if any have been issued.

Where, after letters of administration, on the ground of intestacy, have been granted, a will is admitted to probate, and letters are issued thereupon; or where a subsequent will is admitted to probate and letters are issued thereupon; the decree, granting probate, must revoke the former letters.

§ 154, *Sur. Ct. A. Former* § 2624, *Code Civ. Pro.*

The decree admitting a will to probate after letters of administration have been issued should revoke the former letters. *Power v. Speckman*, 126 N. Y. 354, 358.

Letters of administration which are revoked by the decree admitting a will to probate are not revived by a judgment declaring such will invalid, but a new appointment must be made in the regular way. *Belden v. Belden*, 118 App. Div. 296, 103 N. Y. Supp. 346.

Decree when will is in foreign language.

When a will written in a foreign language is admitted to probate, the surrogate should require or cause it to be translated into English, and the translation so made will be taken as part of the decree of probate. *Caulfield v. Sullivan*, 85 N. Y. 153, 161.

Recording.

It is sufficient if the English translation be recorded, but in localities where the foreign language is largely used the practice of recording the will in the foreign language also is proper.

Denying probate to part of a will. See ¶ 64.

In a proper case the surrogate has the power to deny probate to a part of a will inserted by fraud or mistake. This

power is denied by implication in nearly all cases involving construction where language is used that the court has no power to change the will or make a new one. But still where a clause is inserted by mistake or fraud, the surrogate has power to correct the injustice. *Matter of Swartz*, 79 Misc. Rep. 388, 139 N. Y. Supp. 1105.

Will of real and personal contested by one who was an heir-at-law and not a next of kin — *held* that the surrogate might refuse probate of the whole will on contestant's application. *Matter of Bartholick*, 141 N. Y. 166. See also 35 N. Y. St. Repr. 730, 12 N. Y. Supp. 640, 5 id. 842.

Whether a will shall be probated as a will of real or personal property or both does not depend upon the present existence of both classes of property.

If the will purports to deal with both real and personal estate and the proof is sufficient, it should be admitted as a will of real and personal estate, even though it is alleged that the testator did not die seized of both classes of property. *Matter of Merriam*, 136 N. Y. 58.

Reference should be had to the petition and citation to determine whether the application and citation authorizes the probate as a will of both real and personal property or as to one only. § 144, ¶ 63.

After a will has been probated as a will of personal property only, it may be again offered for probate and be probated as a will of real property. *In re Neil's Will*, 159 N. Y. Supp. 110.

¶ 67 Effect of Decree Upon Contents of Will Probated.

The surrogate determines whether the will is valid to pass real property; not whether the devise is valid.

The surrogate must examine the will to ascertain whether it purports, or is sufficiently comprehensive, to dispose of real property, and if it does he is then to decide that it shall be admitted to probate as a will valid for such a purpose, pro-

vided he finds it to have been duly executed, and the petition and citation so required. This is the extent of the surrogate's jurisdiction, and the effect of his decision goes no further. He does not decide that the instrument in fact passes title to any real estate, and he is not charged with any inquiry of that character. The testator may not have been the owner of any lands when he died, and yet, if the will assumes to make a devise of realty, or is broad enough to include a transfer of such property, the surrogate may probate it as a will of real property, if the petitioner so requests. What is meant by the words of the statute, "a will valid to pass real property," is an instrument duly executed which undertakes in terms to convey that species of property.

It is thus apparent that there were sufficient grounds for the legislative direction to the surrogate to determine whether a will shall be admitted to probate as a will valid to pass real property without giving to his decision the effect of an adjudication as to the validity of the devises in the will. The decree casts no cloud upon the title of the heirs-at-law. In any action or proceeding brought by them to recover possession of the real property they can safely rest upon their rights of heirship. The record of the will is evidence of its due execution and of the mental competency and freedom from restraint of the testator, and not of the validity of the devises contained in it in any tribunal where the title to the real property of the testator may be in issue. *Matter of Merriam*, 136 N. Y. 58; aff'g, 42 N. Y. St. Repr. 619, 16 N. Y. Supp. 738.

Although the provision of the will may be invalid the surrogate must admit the will to probate, but he may make a decree adjudging its invalidity as to personal estate. *Matter of Dewitt*, 113 App. Div. 790, 99 N. Y. Supp. 415; aff'd, 188 N. Y. 567.

A will may be admitted to probate although it no longer serves as a medium for the transfer of property.

This question was fully considered in *Matter of Davis* (182 N. Y. 468; aff'g, 45 Misc. Rep. 306 and 105 App. Div. 221), where the court said:

“ Upon the trial before the surrogate the only ground relied upon to defeat probate of the will was the fact that the sole devisee, legatee, and executrix named therein had died before the testatrix. The surrogate was not asked to construe the will or to pass upon its effect but to adjudge that it was not a will. It was not claimed that the instrument presented for probate was not a will in form or that it was invalid upon its face. The sole claim was that upon proof of an extrinsic fact it became apparent that the will was not effective to pass property or to appoint an executor, although it was effective as a revocation of all former wills.

“ In our view the true rule of law is that when a paper, unrevoked, testamentary in character, purporting upon its face to devise or bequeath real or personal property, executed according to the formalities of the statute by a person of proper age and qualifications, and shown satisfactorily to be of sound mind and not under restraint, is presented to a Surrogate's Court for probate, such court has not authority upon the question of its admission to probate to inquire whether the provisions of the paper are ineffectual to pass title because the sole beneficiary and executor is dead and the devise or bequest has thereby lapsed, or because the provisions of the instrument are ineffectual to pass title of the estate to the person named. Any other rule would lead to confusion and to the introduction of false issues in the probate of wills.

“ There is no authority to construe the will for the purpose of defeating probate, although it may be examined to discover its bearing upon questions relating to its execution, the capacity of the testator and the like. Were the rule otherwise singular results might follow. If the only disposing clause of a will should devise and bequeath all the property of the testator to a trustee for 100 years, the surrogate could not refuse to admit it to probate because the gift was void under our statutes, although it would be apparent upon the face of the instrument. It would be his duty to admit the will to probate upon due proof of the statutory requirements, and,

if asked to construe it, to pass upon the validity of the gift afterward.

“ We have a statute which provides that a devise to a child shall not lapse even if the devisee dies before the testator, provided he leaves a descendant who survives the testator, and that such a devise shall vest in the surviving descendant the same as if the ‘ devisee had survived the testator and had died intestate.’ Upon the trial of a proceeding to prove a will the surrogate could not try the question of fact as to who died first, which might arise under this statute, even if the validity of the only gift in the will depended wholly upon it. The same would be true of an issue as to marriage or divorce, where the status of marriage determined the effect of the only devise or bequest. Such issues are immaterial in a proceeding to prove a will and there is nothing in the statute, which is the exclusive source of the surrogate’s authority, to show that the Legislature intended to clothe him with power to decide them. The true rule of law is that when a paper, unrevoled, testamentary in character, purporting on its face to devise or bequeath real or personal property, executed according to the formalities of the statute by a person of proper age and qualifications and shown satisfactorily to be of sound mind and not under restraint, is presented to a Surrogate’s Court for probate, such court has no authority upon the question of its admission to probate to inquire whether the provisions of the paper are ineffectual to pass title because the sole beneficiary and executor is dead and the devise or bequest has thereby lapsed, or because the provisions of the instrument are ineffectual to pass title to the person named. Any other rule would lead to confusion and to the introduction of false issues in the probate of wills.”

Not nullified by subsequent events.

The fact that events have happened which have nullified the will does not render the will invalid. *Van Beuren v. Dash*, 30 N. Y. 393; *Matter of Hock*, 74 Misc. Rep. 15, 129 N. Y. Supp. 196.

- A will which gives and devises all the estate to a sister and appoints her executrix may be admitted to probate, although the sister died before the executrix. *Matter of Davis*, 105 App. Div. 221, 182 N. Y. 468.

Testator devised all his real estate to the United States — held, that as such devise was void the will could not be admitted to probate as a will of real estate. *Matter of Fox*, 52 N. Y. 530.

This same question was decided differently in *Matter of Merriam* (136 N. Y. 58), and the latter case is now the law upon the subject.

A will which did not provide for an after-born child, although he was sole next of kin, is entitled to probate although nothing passes under it. *Matter of Bunce*, 6 Dem. 278. 15 N. Y. St. Repr. 415.

Will which violates a prior contract.

A will may be made in violation of a contract not to make a will, or not to make a will containing certain provisions, or to make a will containing specified provisions. Such a will can not be denied probate because it is not in accordance with such contract. It may need the probate to furnish the foundation for an action upon the contract for its breach, or so that an action may be brought against some person having title to the property to recover it.

The decree of probate will not be an obstacle in prosecuting the action under the contract, as the decree establishes only that the will was legally executed by a competent testator, and not that any property passed by reason of it.

CHAPTER XVIII.

Construction of Wills May be Obtained in Probate Proceedings, in Judicial Settlement Proceedings, and in a Proceeding Instituted Specially. General Rules of Construction.

- ¶ 68. § 145. Proceeding for construction of will.
 - Importance of obtaining construction on probate.
 - Construction of will in decree of judicial settlement.
- ¶ 69. General rules of construction.
- ¶ 70. Effect of words of desire, wish and request.
- ¶ 71. Doctrine of election applied in construing wills.
- ¶ 72. § 205. Action to determine validity of provisions of a will.

¶ 68 Proceeding for Obtaining Construction of Will.

Construction of a will, how obtained.

An executor, administrator with the will annexed, or any person interested in obtaining a determination as to the validity, construction or effect of any disposition of property contained in a will, may present to the surrogate's court in which such will was probated, a petition setting forth the facts which show his interest, the names and post-office addresses of the other parties interested, and the particular portion of such will concerning which he requests the determination of the court.

If the surrogate entertains the application, a citation shall issue to all persons interested in the question to be presented, to show cause why such determination should not be made. On the return of the citation the surrogate shall make such decree as justice requires.

If a party expressly puts in issue in a proceeding for the probate of a will the validity, construction, or effect of any disposition of property, contained in such will, the surrogate may determine the question, upon rendering a decree, after notice given in such manner as the surrogate directs to all persons interested who do not appear on such application in person or by attorney; or, unless the decree refuses to admit the will to probate, by reason of a failure to prove any of the matters specified in the preceding section may admit the will to probate and reserve the questions so raised for future consideration and decree.

§ 145, *Sur. Ct. A.* Former § 2615, *Code Civ. Pro.*

Section 40 gives added jurisdiction to construe a will, and this section provides how such construction may be obtained.

The limitations and restriction heretofore existing as to when and under what conditions construction might be had

have been largely abrogated, so that many of the decided cases no longer apply.

Construction of a will may be obtained in three ways, in the proceeding for probate, in the proceeding for judicial settlement, and in an independent proceeding brought under this section.

This last provision was designed to prevent a resort to an action in Supreme Court for the construction of a will with its attendant expense and delay.

Importance of obtaining construction of will on probate.

The advantage of obtaining a construction of a will on the proceeding for the probate thereof is not fully appreciated and for that reason is very seldom resorted to.

In the process of administering the estate it often happens that questions arise as to the construction of the will which are exceedingly perplexing to the executor and often leave the executor in doubt as to the proper course to be pursued by him.

There may be cases where the decree of probate will estop a person from enforcing his rights if he fails to require a construction of the will on probate. *Phalen v. U. S. Trust Co.*, 100 App. Div. 264, 91 N. Y. Supp. 537, is an illustration. In that case the testator made a codicil which violated an antenuptial contract, and because the person interested did not require a construction and raise the question, it was held that the decree of probate cut off his right to bring an action upon the contract. This case may not be in harmony with the best decisions, but it shows the danger.

Authority to construe will on probate.

The authority of the surrogate rests wholly upon statute. In 1879 (chap. 359), the power was conferred upon the surrogate of the city and county of New York. By the Code of Civil Procedure it was conferred upon all surrogates in the State. Before these statutory enactments, while the surrogate necessarily had jurisdiction, for the purposes of dis-

tribution, to construe a will and decide on the validity of its provisions (*Matter of Verplanck*, 91 N. Y. 439), he had no power in advance of distribution or directions for payments from the estate, to adjudicate the effect or validity of the will. Actions for the construction of a will could be maintained only in courts of equity as ancillary to their jurisdiction over trusts, and the right to maintain such suits was subject to limitations and qualifications dependent on the nature of the testamentary disposition and the attitude of the party invoking the court's action (*Chipman v. Montgomery*, 63 N. Y. 221; *Wager v. Wager*, 89 id. 161). The intention of the Code provision was to confer upon the surrogate power and jurisdiction similar to that theretofore possessed by courts of equity. In one respect it is probably a little broader, because a court of equity would not entertain an action brought by one claiming the legal title in unqualified hostility to the will, while the section requires the surrogate to determine the validity of the testamentary disposition when challenged, as well as the construction of the will. Still this does not deprive the surrogate of the discretion possessed by a court of equity to refuse to decide questions which may never be presented by actual conditions or occurrences. This view as to the effect of the Code provision was held by the late Surrogate Rollins in *Jones v. Hammersley* (4 Dem. 427), and the reasons for such conclusion are very clearly and cogently stated in the opinion rendered by him in that case. As to the rule prevailing in a court of equity, it is necessary to refer to but a single decision in that court, that of *Horton v. Cantwell* (108 N. Y. 255). The court there refused to determine whether the plaintiff was entitled to a remainder in the estate on certain contingencies which might or might not occur. *Matter of Mount*, 185 N. Y. 162; aff'g, 107 App. Div. 1.

By chap. 584, L. 1910, a radical change was made in the jurisdiction of the surrogate to construe wills on probate. Therefore such construction was confined to wills of personal property, but the amendment included wills of real estate.

In 1913 an amendment was further made to former section 2624 authorizing the reservation of the question of construction until after the decree of probate.

Where a construction of a residuary clause must be academic and abstract and no present necessity requires a decision, and such decision would attempt to define rights of persons who are not parties, none should be made. *Matter of Mount*, 107 App. Div. 1; aff'd, 185 N. Y. 162.

Decision will not be made construing a clause disinheriting a child if he adopts a certain religious faith, when it appears that he has not adopted such faith. *Davis v. Davis*, 86 App. Div. 401; modifying and affirming 39 Misc. Rep. 90, 78 N. Y. Supp. 899.

Where it was claimed by a niece that more than one-half of the estate was given to a corporation in violation of former chap. 360, L. 1860, the surrogate determined the question. *Matter of Talmadge*, 59 Misc. Rep. 130, 112 N. Y. Supp. 206.

Surrogate has no jurisdiction to determine whether an attempted appointment of testamentary guardian is void, as he may under this section construe only dispositive clauses. *Matter of Meyer*, 72 Misc. Rep. 566, 131 N. Y. Supp. 27.

Construction may be reserved until judicial settlement. This was done where a bequest to an unincorporated church was made, in order that it might incorporate and so be able to take the legacy upon judicial settlement. *Matter of Powell*, 136 App. Div. 830, 121 N. Y. Supp. 779.

Construction on probate—notice.

Most surrogates think it the safer practice to have a construction asked for in the petition for probate, and notice given in the citation, but it does not seem to be necessary to do this since a person cited is cited for all the purposes of the probate proceeding of which construction may be one. If, however, any person is interested in the construction who has not been cited, he should be given a reasonable notice of the hearing upon that question. *In re Farmer*, 163 N. Y. Supp. 1089.

Decree upon construction of will may deny probate.

When a construction of a will is asked for on probate, it may result in a denial of probate, although the will was properly executed by a competent testator.

The test is not whether there is any property to pass under it according to its terms, but whether the will is so drawn that no property could pass under it in accordance with the intention of the testator.

In *Matter of Dewitt*, 113 App. Div. 790; aff'd, 188 N. Y. 567; legacies were declared void, and the will was denied probate as a will of personal estate, but allowed as a will of real estate, as under the law at that time the surrogate could not construe a will as to real estate.

Jurisdiction to construe a will upon rendering a decree of judicial settlement.

The surrogate in a proceeding before him having for its object the settlement of the executor's accounts and the making of a decree of distribution when all the parties in interest are present has authority to construe the provisions of the will and determine its meaning and validity. *Garlock v. Vandervort*, 128 N. Y. 374; *Matter of French*, 52 Hun, 303, 23 N. Y. St. Repr. 450, 5 N. Y. Supp. 249; *Matter of Young*, 17 Misc. Rep. 680, 41 N. Y. Supp. 539; aff'd, 44 id. 585; *Baldwin v. Smith*, 3 App. Div. 350; *Washbon v. Cope*, 144 N. Y. 287; revg. 67 Hun, 272, 22 N. Y. Supp. 241, 50 N. Y. St. Repr. 821.

Upon the judicial settlement of the accounts of an executor or trustee, the surrogate has full power to pass upon all questions that are necessarily involved in such accounting whether they refer to real estate or are simply confined to personality. *Matter of Bruchaeser*, 49 Misc. Rep. 197; *Matter of Perkins*, 75 Hun, 129, 57 N. Y. St. Repr. 228, 26 N. Y. Supp. 958; aff'd, 145 N. Y. 599; *Tappen v. M. E. Church*, 3 Dem. 187.

The surrogate has jurisdiction to construe will on application to compel an executor to account. *Matter of Metcalfe*, 1 Gibb. Sur. Rep. 16.

Proceeding for obtaining construction of will.

It is not the intent of § 145 that the surrogate shall construe a will merely for the purpose of relieving the mental anxiety of some legatee or of expressing his opinion of the effect of testamentary dispositions of property under circumstances which may never arise or contingencies which may never happen. *In re Leary's Estate*, 154 N. Y. Supp. 959.

This section bestows upon the Surrogate's Court a power, not previously enjoyed, to construe a will in a proceeding brought for that purpose. The exercise of this power is hedged about by the limitations contained in the section: that the proceeding can only be had with respect to a will probated in the court to which the application is made; that a citation shall issue if the surrogate entertains the proceeding; and that, on the return of the citation, the surrogate shall make such decree as justice requires. The whole section must be read with the accompanying enactment contained in section 40. *In re Bouchoux*, 89 Misc. Rep. 47, 152 N. Y. Supp. 548.

Section 68 does not make it necessary to award a jury trial in a proceeding for the construction of a will. *Matter of Harden*, 88 Misc. Rep. 421.

One of the rules which the surrogate should lay down in proceedings of this character is that where the construction may, without any substantial prejudice to the parties meanwhile, be accorded at a later stage, in the regular way, on the settlement of the final accountings of the testamentary trustees or the personal representatives, that then such construction ought to be postponed by the surrogate until the final accounting or the settlement of the decree to be made thereon. Otherwise a party aggrieved by the construction accorded might be forced to take separate appeals, one from the decree affording construction and another from a decree of distribution on the final accounting. Such a course of procedure would be both vexatious and intolerable. *In re Harden's Estate*, 150 N. Y. Supp. 743, 88 Misc. Rep. 421.

By what law construed.

Where a citizen of this country, claiming his domicile here, but temporarily residing abroad, executes a will abroad, such will must be construed by our courts according to our laws. *Caulfield v. Sullivan*, 85 N. Y. 153.

The construction of a domestic will, although executed by a person residing abroad must be determined by our law. *N. Y. Life Ins. & T. Co. v. Viele*, 161 N. Y. 11; aff'g, 22 App. Div. 80.

Construction which determines title to real estate.

While the language conferring jurisdiction upon the surrogate to construe wills is broad enough to include a determination of a question of title, there has been doubt expressed by some surrogates as to such jurisdiction. *Matter of Smith*, 96 Misc. Rep. 414, 160 N. Y. Supp. 514; *Weil v. Weil*, 107 Misc. Rep. 145, 176 N. Y. Supp. 248.

Unquestionably the surrogate has no jurisdiction to try the title to real estate for the sole purpose of settling a contention on that issue.

A different situation arises where a representative appointed by the Surrogate's Court must in the performance of his official duties do or refrain from doing certain acts depending upon the title to real estate over which he has some control or authority, or where the parties interested under a will, the rights of which parties in every other particular the surrogate is required to adjust and protect, ask for a judicial determination of their rights in real estate which forms a part of the estate in which they are interested. It seems clear that it was the intention of the framers of the new and amended sections giving jurisdiction, that whenever real estate was a part of the estate to be administered, all questions respecting it which are necessary to be determined to completely settle the estate and to vest the title in those to whom it passed in the due course of administration might and should be determined by the surrogate.

The surrogate may well refuse to take jurisdiction to construe a will as to title to real property where the petition shows that the construction is not asked for with reference to the settlement of the estate and does not affect the rights and interests of the parties in connection therewith. It must be remembered that the broadened jurisdiction is given when required to be exercised with reference to making a decree or other disposition which the surrogate is required to make and not to sit as a court of independent jurisdiction.

Proceeding not entertained where title had passed and the only person to be affected by the decision was not a party to the proceeding. *In re Laurer*, 89 Misc. Rep. 47, 152 N. Y. Supp. 548.

Evidence may be received to ascertain the intention of the testator as to what portion of his real estate he included in or excluded from the description of the lands devised. *Matter of Phipp*, 214 N. Y. 378.

Proceeding entertained where the executors alleged that they could not safely pay legacies until a construction was made as to whether the legacies were charged upon real estate. *In re Noe*, 157 N. Y. Supp. 681, 94 Misc. Rep. 60.

Construction agreed upon.

Where parties have agreed and acted upon a certain construction of a will for twenty years, no other construction will be given it. *Reid v. Sprague*, 72 N. Y. 457.

¶ 69 General Rules of Construction.

As a will is ambulatory, the general rule is that it must be considered upon the law as it exists at the time of the death of the testator. *Bishop v. Bishop*, 4 Hill, 138; *DePeyster v. Clendinning*, 8 Paige, 295, 304; aff'd, *sub. nom. Bulkley v. Depeyster*, 26 Wend. 21; *Parker v. Bogardus*, 5 N. Y. 309; *Moultrie v. Hunt*, 23 id. 394; *People v. Powers*, 147 id. 104.

By "construction" of a will we may understand the ascertainment of the meaning and force of the words thereof and

the effect in law of the dispositions made therein. *Cutting v. Cutting*, 86 N. Y. 522, 535.

In construing a will the question is, what was the intention of the testator? That is to be ascertained from the language which he used. As was said by Judge O'Brien in *Johnson v. Brasington* (156 N. Y. 181, 185): "When we speak in such cases of the intention of the testator we do not always refer to some intention or purpose that he actually had in mind. We mean that when he has expressed himself in ambiguous or doubtful language that the law will impute to his words such a meaning as, under all the circumstances, will conform to his probable intention and be most agreeable to reason and justice." *Riker v. Gwynne*, 201 N. Y. 143; *Nolan v. Nolan*, 169 App. Div. 372, 154 N. Y. Supp. 355.

"The duty of the court is not to make a new will or codicil to carry out some supposed but undisclosed purpose, but to ascertain what the testator actually intended by the language employed by him when properly interpreted, and then to determine whether such intended provisions are valid or otherwise. The duty of the court is to interpret, not to construct; to construe the will and codicil, not to make new ones." *Herzog v. Title Guarantee & Trust Co.*, 177 N. Y. 86. "But it is not sufficient that such a will should be a natural one and legal, for we cannot make a will for a testator, however good our work may be." *Hooker v. Hooker*, 41 App. Div. 235.

Where a will is capable of two interpretations the one should be adopted which prefers those of the blood of the testator to strangers. *Wood v. Mitcham*, 92 N. Y. 375, 379, and cases there cited.

The intention of the testator will not be defeated by the injudicious use of punctuation or by the substitution for some perfectly apt word of one less so, providing the meaning can reasonably be found. *Mee v. Gordon*, 187 N. Y. 400, revg. 104 App. Div. 520.

In ascertaining such intention we are required to take into consideration the surrounding circumstances under which he

framed the provisions of the will, the situation of his estate and of the members of his family whom he wished to be the recipients of his bounty. *Williams v. Jones*, 166 N. Y. 522-532. In considering these circumstances for the purpose of ascertaining the intention of the testator, there is a presumption which we must bear in mind, and that is that in the absence of unfriendly relations existing between testators and their descendants, there almost invariably exists a desire and an intention on the part of testators that their property should go to their descendants, rather than to strangers to their blood. *March v. March*, 186 N. Y. 99.

It is the well-settled rule that where valid and invalid portions of a will are so interdependent as to constitute one scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and the other portion was rejected, the entire will fails. *Beekman v. Bonsor*, 23 N. Y. 298, 311; *Tilden v. Green*, 130 id. 29, 50; *Kalish v. Kalish*, 166 id. 368, 375; *Matter of Dewitt*, 113 App. Div. 790, 99 N. Y. Supp. 415.

In the interpretation of a residuary clause the court will look, not only at the language employed, but at the surrounding circumstances, to discover what the intention of the testator was. *Kerr v. Dougherty*, 79 N. Y. 327, modifying 17 Hun, 341.

There is a presumption that a testator intends to dispose of all of his property and a construction which accomplishes that will be favored. *Williams v. Petit*, 138 App. Div. 394, 122 N. Y. Supp. 746.

Restraint of marriage.

Bequest to those daughters who were unmarried at the death of a beneficiary of a trust, *held* not to be against public policy as being in restraint of marriage. *Robinson v. Martin*, 200 N. Y. 159.

Conditions in general restraint of marriage were regarded at common law as contrary to public policy and therefore void. *Hogan v. Curtin*, 88 N. Y. 162.

Conditions restraining marriage with a particular person or classes of persons will not invalidate a bequest or devise. *In re Seaman*, 218 N. Y. 77.

Intent of testator must be ascertained, and effectuated if possible.

The making of a will naturally imports an intention to make a testamentary disposition of property. But the intention is one thing and its execution is quite another thing. While courts have great latitude in giving effect to imperfectly expressed testamentary intentions, they have no right to make wills for testators. Although a will need not be framed in any particular or set phrase, it must at least be so plain as to furnish some tangible clue to the testator's intention. In cases where the language of wills have been inexact or ambiguous the courts have frequently transposed or inserted words or phrases, or even left out or inserted provisions in order to effectuate an intent that was with reasonable certainty to be gathered from the context of the whole instruments. *Phillips v. Davies*, 92 N. Y. 199, 204; *Pond v. Bergh*, 10 Paige, 140. Courts have no power, however, to construct a will where none has in fact been made, nor to import into a will new provisions which are designed to create a testamentary disposition which is neither expressed nor necessarily to be implied. *Wager v. Wager*, 96 N. Y. 164, 172; *Dreyer v. Reisman*, 202 N. Y. 476.

At the threshold of every suit for the construction of a will lies the rule that the court must give such construction to its provisions as will effectuate the general intent of the testator as expressed in the whole instrument. It may transpose words and phrases and read its provisions in an order different from that in which they appear in the instrument, insert or leave out provisions, if necessary, but only in aid of the testator's intent and purpose. *Tilden v. Green*, 130 N. Y. 29, 42; *Matter of Whiting*, 33 Misc. Rep. 274, 68 N. Y. Supp. 733.

“If the plain and definite purposes of a will are endangered by inapt or inaccurate modes of expression, and we are sure we know what the testatrix meant, we have the right,

and it is our duty, to subordinate the language to the intention. In such a case, the court may reject words, supply them, or transpose them, to get at the correct meaning." *Lathrop v. Lathrop*, 18 N. Y. Supp. 652; *Phillips v. Davies*, 92 N. Y. 199; *Case v. Case*, 16 Misc. Rep. 393; *Weeks v. Weeks*, 16 Abb. N. C. 143.

The omission of the word "dollars" after a sum named in a will as a legacy, may be supplied by the surrogate in construing the will. *Matter of Nesmith*, 6 Dem. 333.

Ambiguous wills; extrinsic evidence.

Extrinsic evidence in aid of construction is permissible in comparatively few instances. It is an old rule in causes of this kind that parol declarations of a testator are inadmissible to control a written will or to affect its construction. In *Mann v. Executors of Mann*, 1 Johns. Ch. 231, Chancellor Kent said that the rule was well settled that parol evidence cannot be permitted to supply, or contradict, enlarge, or vary, the words of a will, nor to explain the intention of the testator except in two cases, viz., where there is a latent ambiguity arising de hors the will as to the person or subject meant to be described, or to rebut a resulting trust. A will is ambiguous only when, after full consideration, it is determined judicially that no interpretation can be given it. Beal, *Rules of Interpretation*, 580. In other words, it is only when a will is uncertain, ambiguous, or doubtful that extrinsic evidence is allowed to be taken (*Ritch v. Hawxhurst*, 114 N. Y. 512, and then the nature of the extrinsic evidence is very restricted. *In re Gorsch*, 103 Misc. Rep. 156, 169 N. Y. Supp. 1064; *Ladies U. B. Soc. v. Van Natta*, 43 Misc. Rep. 217.

Rules applied in construing codicil to will.

A revocation of an earlier disposition of a will by a later one, or by a codicil, on the ground of repugnancy, is never anything but a rule of necessity, and operates only so far as is requisite to give the later provision effect. *Pierpont v. Patrick*, 53 N. Y. 591, 595.

Where provisions are repugnant it is the duty of the court to preserve the paramount intention of the testator at the expense even of some subordinate particulars. *Taggart v. Murray*, 53 N. Y. 233; *Austin v. Oakes*, 117 id. 577.

Intention to disinherit not sufficient to sustain an attempted devise.

“ It is a settled principle of law that the legal rights of the heir or distributee, to the property of deceased persons, cannot be defeated except by a valid devise of such property to other persons. * * * It was not sufficient to deprive an heir-at-law or distributee of what comes to him by operation of law, as property not effectually disposed of by will, that the testator should have signified his intention by his will that his heir or distributee should not inherit any part of his estate.” *Haxtun v. Corse*, 2 Barb. Ch. 506, 521; *Chamberlain v. Taylor*, 105 N. Y. 185, 194; *Gallagher v. Crooks*, 132 id. 338, 342; *Pickering v. Lord Stamford*, 3 Ves. 491, 493; *Johnson v. Johnson*, 4 Beav. 318; *Fitch v. Weber*, 6 Hare, 145; *Denn v. Gaskin*, Cowp. 657, 661; *Wood v. Hubbard*, 29 App. Div. 166, 51 N. Y. Supp. 526; *Henriques v. Yale U.*, 28 App. Div. 354, 51 N. Y. Supp. 284, aff’g, 22 Misc. Rep. 653, 51 N. Y. Supp. 133; app. dism., 157 N. Y. 672; *Matter of Trumble*, 199 N. Y. 454. *In re Watts Est.*, 182 N. Y. Supp. 910; *Matter of Rauchfuss*, 2 Dem. 271; distinguished in 5 Dem. 361.

Preservation of valid parts of a will.

The principle is now well settled that the courts lean in favor of the preservation of such valid parts of a will as can be separated from those that are invalid without defeating the general intent of the testator. *Harrison v. Harrison*, 36 N. Y. 543, 547; *Matter of Berry*, 154 App. Div. 509, 139 N. Y. Supp. 186, aff’d, 209 N. Y. 540, 102 N. E. 1099; *Davis v. MacMahon*, 161 App. Div. 458, 146 N. Y. Supp. 657, aff’d, 214 N. Y. 614; *Bailey v. Buffalo L. T. & S. D. Co.*, 213 N. Y. 525; *Kalish v. Kalish*, 166 N. Y. 368; *Smith v. Chesebrough*, 176 N. Y. 317; *U. S. Trust Co. v. Hogencamp*, 191 N. Y. 281; *Brinkerhoff v. Seabury*, 137 App. Div. 916, 122 N. Y. Supp.

481, aff'd, 201 N. Y. 559; *Henderson v. Henderson*, 113 N. Y. 1; *Hascall v. King*, 162 N. Y. 134, 76 Am. St. Rep. 302; *In re Hitchcock*, 222 N. Y. 57.

¶ 70 Effect to be Given to Words of Desire, Wish, and Request Contained in a Will. See ¶ 278.

It is perfectly well settled that what are denominated precatory words, expressive of a wish or desire, may, in given instances, create a trust or impose a charge. Without a detailed consideration of the cases, it is quite clear, that, as a general rule, they turn upon one important and vital inquiry, and that is, whether the alleged bequest is so definite as to amount and subject matter as to be capable of execution by the court, or whether it so depends upon the discretion of the general devisee as to be incapable of execution without superseding that discretion. In the latter case there can neither be a trust nor a charge, while in the former there may be, and will be, if such appears to have been the testamentary intention. The distinction is clearly drawn, and was acted upon in *Lawrence v. Cooke*, 104 N. Y. 632. The word there used was "enjoin," in itself a more imperative word than "wish," and yet a trust or charge was denied, because by the terms of the command the payment to the granddaughter was placed wholly within the discretion of the residuary devisee, and could not be touched by the court without its utter destruction. The provision to be made was at such times, in such manner, and in such amounts as the devisee should judge to be expedient, and controlled only by what her own sense of justice and Christian duty should dictate. It was added that, if she had been enjoined to make suitable provision out of the residuary estate, a charge would have been created, for what would be "suitable" could be determined as a fact, and would be independent and outside of the mere choice or whim of the devisee. If the word had been "wish" instead of "enjoin," the result could not have been different upon either branch of the conclusion. The doctrine is clearly and

strongly stated in *Warner v. Bates* (98 Mass. 277), and had an early illustration in *Malim v. Keighley* (2 Ves. Ch. 532). The primary question in every case is the intention of the testator, and whether in the use of precatory words he meant merely to advise or influence the discretion of the devisee, or himself to control or direct the disposition intended. In such a case we must look at the whole will, so far as it bears upon the inquiry, and the use of the words "I wish" or "I desire" is by no means conclusive. They serve to raise the question, but not necessarily to decide it. *Phillips v. Phillips*, 112 N. Y. 197, 204.

Wish, etc., not effective.

Testator devised all his estate to his wife and then said: "It is my wish and desire that my wife pay," etc.—*held*, no liability created. *Post v. Moore*, 181 N. Y. 15, *aff'g*, 89 App. Div. 613, distinguishing *Collister v. Fassitt*, 163 N. Y. 281; which *aff'd* 23 App. Div. 466, 48 N. Y. Supp. 792.

Words of wish and desire stated not to be intended as a direction or instruction—*held* not to be effective to constitute a trust. *Wood v. Seward*, 4 Redf. 271.

The testator gave his wife the whole residuary estate requesting her to make a certain disposition of it at her death—*held*, an absolute gift. *Foose v. Whitmore*, 82 N. Y. 405.

Absolute gift to wife with expression of desire and request that certain disposition of the property should be made by her—*held* no limitation upon her right of disposition. *Clay v. Wood*, 153 N. Y. 134, *aff'g*, 91 Hun, 398, 70 N. Y. St. Repr. 781, 36 N. Y. Supp. 317.

Absolute gift of residuary estate to wife with expression of expectation and desire that she should not do certain things—*held*, that the right of disposition was absolute. *Matter of Gardner*, 140 N. Y. 122, *aff'g*, 69 Hun, 50, 52 N. Y. St. Repr. 810, 23 N. Y. Supp. 429.

Absolute gift to daughter and continuing: "I enjoin upon her to make provision," etc.—*held* an absolute gift. *Lawrence v. Cooke*, 104 N. Y. 632.

“ It is my desire and request that S. watch over and care for,” etc.— *held* not to create a trust or impose an obligation. *Wilde v. Smith*, 2 Dem. 93.

After making an absolute gift, testator said: “ Only to be held to leave the same to the children of our marriage when the time comes.”— *held* an absolute gift. *Bollentin v. Bollentin*, 57 Misc. Rep. 250, 109 N. Y. Supp. 212.

Wish, etc., effective.

Gift of whole estate to wife saying: “ If she find it always convenient to give my brother,” etc.— *held* there being sufficient income, that the provision for the brother was valid. *Phillips v. Phillips*, 112 N. Y. 197.

Gift in trust for support of husband, at his death, what remained was subject to his will for charitable purposes, “ but it is my wish that one-half should go,” etc.— *held* the husband dying before the wife and leaving the power unexecuted, that there was a valid gift over. *Decker v. High St. M. E. C.*, 27 App. Div. 408, 50 N. Y. Supp. 260.

“ I desire my executors to divide the surplus among,” etc.— *held* to be a gift to charitable purposes. *Manley v. Fiske*, 66 Misc. Rep. 388; *aff'd*, 139 App. Div. 665; *aff'd*, 201 N. Y. 546.

¶ 71 Disposition by Will of the Property of Another. Beneficiary Must Elect.

A beneficiary who chooses to accept the bounty of a testator must do so upon such terms and conditions as the testator has seen fit to impose. He cannot insist that provisions in his favor shall be enforced and that those to his prejudice shall be ignored and set at naught.

No man shall claim any benefit under a will without, as far as he is able, conforming and giving effect to everything contained in it whereby any disposition is made showing an intention that such a thing shall take place without reference to the circumstances whether the testator had any knowledge of the extent of his power or not.

If a testator intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will, that person shall not be permitted to defeat the disposition, where it is in his power and yet take under the will. The reason is the implied condition that there must be an election, for though the mistake of the testator cannot affect the property of another person, yet that person shall not take the testator's property unless in the manner intended by the testator. *Matter of Noyes*, 7 N. Y. St. Repr. 706.

There have been numerous cases on this subject, the result of which appears to be that a person shall not claim an interest under an instrument without giving full effect to that instrument as far as he can. This rule has been said to be universal and without exception.

The Court of Appeals, in *Havens v. Sackett* (15 N. Y. 365), refers to the rule as a well-established rule of the courts of equity, which may be expressed in these terms: "One who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it. For example, if a testator has affected to dispose of property not his own, and has given a benefit to the person to whom that property belongs, the legatee or devisee accepting the benefit so given to him must make good the testator's attempted disposition. If he insist on retaining his own property which the testator has attempted to give to another person, equity will appropriate the gift made to him for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of his rights. If the parties have done nothing to conclude themselves, and the court will not consider anything done in ignorance of their rights as binding them, the party whose property has been given to another will be put to his election, either to take what is offered to him in the in-

strument, yielding up to the party who would otherwise be disappointed his own property, or to keep what was his own, abandoning the provision made for him in the instrument.”

The rule is referred to with approval in *Chipman v. Montgomery* (63 N. Y. 221); *Haack v. Weicken* (118 id. 67), and in many other cases.

The rule does not rest so much upon presumptions as upon the general principles of right, justice, and fair dealing. Its general application and the foundations upon which it rests are stated in Pomeroy's Equity ([3d ed.], vol. 1, § 461, etc.) and also by most of the other writers on equity. *Beetson v. Stocps*, 186 N. Y. 464.

A beneficiary under a will cannot claim such benefits and set up a claim of ownership of a mortgage disposed of by the will on the theory that it was not the property of testator. *Gibbins v. Campbell*, 148 N. Y. 410; aff'g, 66 Hun, 631.

Where testatrix gave away property not her own and the owner procured a judgment establishing his ownership, he forfeited the provision in his favor. *Matter of Bratt*, 10 Misc. Rep. 491, 65 N. Y. St. Repr. 247, 32 N. Y. Supp. 168.

Beneficiary required to elect.

Where a beneficiary has a claim adverse to the provisions of the will, he will be required to elect whether he will accept the whole will, or stand upon his rights which are opposed to the will. *Caulfield v. Sullivan*, 85 N. Y. 153. *Matter of Ballard*, 194 App. Div. 106, 185 N. Y. Supp. 718.

¶ 72 Action to Determine the Validity of the Provisions of a Will.

The validity, construction or effect, under the laws of the state, of a testamentary disposition of real property situated within the state, or of an interest in such property, which would descend to the heir of an intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed, purporting to convey land, may be determined. The judgment in such an action may perpetually enjoin any party, from setting up or from impeaching the devise, or otherwise making any claim in contravention to the determination of the court, as justice requires. But this section does not

apply to a case, where the question in controversy is determined by the decree of a surrogate's court, duly rendered upon allegations for that purpose, as prescribed by law, where jurisdiction of the plaintiff was duly acquired, in the special proceeding in the surrogate's court, before the commencement of the action.

§ 205, *Dec. Est. L.* Former § 1866, *Code Civ. Pro.*

This section repeals chapter 316, Laws of 1879. *Anderson v. Anderson*, 112 N. Y. 104; *Horton v. Cantwell*, 108 N. Y. 255, *aff'g*, 36 Hun, 528.

The more complete jurisdiction of the surrogate's court now enables it to pass upon most if not all of the questions which this section authorizes an action to determine, and no doubt the proceedings in surrogate's court will be generally adopted, although the right to bring the action under this section has not been affected.

This section does not authorize the bringing of an action to determine the validity of the will itself as to whether it was executed by a competent testator without restraint and with proper formalities. *Anderson v. Anderson*, 112 N. Y. 104, *aff'g*, 48 Hun, 534.

The devisee of a devisee can not maintain the action. *Greene v. Fitzgerald*, 178 App. Div. 941, 165 N. Y. Supp. 36, *aff'd*, 223 N. Y. 718.

One who is a purchaser of the premises cannot maintain the action. *Mellen v. Mellen*, 139 N. Y. 210; *aff'g*, 60 Hun, 151.

This proceeding cannot be maintained for the purpose of removing a cloud on title. *Whitney v. Whitney*, 63 Hun, 60, 18 N. Y. Supp. 3; *Adams v. Becker*, 47 Hun, 65, 8 N. Y. Supp. 260; *Hemmje v. Meinen*, 20 N. Y. Supp. 619.

If a *bona fide* question arises as to the "validity, construction or effect" of a testamentary disposition of real property, the courts of this State may, in a proper action, determine the "validity, construction or effect" of such testamentary disposition. This does not attempt to give jurisdiction of the will, as a whole, permitting our courts to give judicial construction to a will of a foreign jurisdiction, affecting solely the interests of residents of a sister State, simply because

there happens to be a piece of real property in this State. If there was any question whether title passed to this real property under the will; if there was any question as to the identity of the property sought to be devised, or as to the effect of the testamentary disposition in disposing of the whole or part of the premises, it would be proper to bring an action under this provision to determine these questions, and the court would be called upon to construe the will in so far as it related to the " validity, construction or effect " of the testamentary disposition, but there its powers and duties would end. *Monypeny v. Monypeny*, 131 App. Div. 269, 115 N. Y. Supp. 804.

CHAPTER XIX.

Procedure Where a Person Entitled to be Cited Has Not Been Cited and the Will Has Been Admitted to Probate. Recording Wills and Their Effect as Evidence; Proceeding to Procure Recording of Foreign Will to Make Prima Facie Evidence of Title to Real Property. Authentication of Papers to be Used.

- ¶ 73. Proceeding to confirm probate as against a person not cited.
 Proceeding to vacate the original decree of probate.
 Evidence of genuineness of signatures and of death from papers on file.
- ¶ 74. § 150. Wills to be recorded and retained.
 Sending will to another state or country.
 Recording wills proved in any court of the state. Competent as evidence.
- § 151. Exemplified wills or an exemplification of the record may be read in evidence.
- § 152. Recording wills in office of county clerk or register.
- ¶ 75. § 440. Proceeding to obtain record of foreign will in surrogate's office to make *prima facie* evidence of title to real property.
- § 450. Papers to be recorded, how authenticated.

¶ 73 Procedure Where a Person Entitled to be Cited Has Been Omitted and the Will Probated. See § 7.

Proceeding to confirm probate.

A petition may be presented setting forth the facts of probate and the subsequent discovery of a necessary party who was not cited, upon which the surrogate may issue a citation to such person to show cause, if any he has, why the evidence taken and the proceedings theretofore had to prove said will should not stand, and why the decree admitting said will to probate and adjudging the same to be a valid will to pass real and personal estate should not be sustained, and why he should not be bound thereby with the same force and effect as if he had been previously cited to attend the original probate thereof.

Upon the return of such citation the person so cited may file objections to the probate and the same may be tried and determined in the usual way. Pending this trial and decision the probate will stand as to all other parties. *Matter of Crumb*, 6 Dem. 478, 2 N. Y. Supp. 744, 18 N. Y. St. Rep. 254.

Other next of kin discovered after trial.

Where citation was not served on all the next of kin, and they did not appear at the trial, they have the right to be brought in and to file objections and demand a new trial.

The decree of probate may be entered as to the interested persons cited, and will stand as to them. *In re Marks*, 109 Misc. Rep. 58, 179 N. Y. Supp. 302.

Proof of death. See ¶ 17.

Where re-probate as to any interested person is made necessary after the lapse of many years, it is sometimes difficult to supply the necessary direct proof as to death, residence at the time of death and other matters.

In some instances this may be done by introducing old records on file in public offices and in the various courts of the State, as hereinafter shown.

Application may be made to vacate the original decree under authority of Surr. Ct. Act, § 20, subd. 6. See ¶¶ 6, 7.

Another method of procedure is to move upon the proper petition to open the decree of probate under section 20, as to the person not cited, which being granted the same proceedings may be had as in original probate.

The time in which to make this application is not limited by special provision of law. *Matter of Harlow*, 56 N. Y. St. Repr. 33, 26 N. Y. Supp. 469; *Matter of Odell*, 1 Misc. Rep. 390, 23 N. Y. Supp. 143.

A creditor cannot move to vacate a decree admitting a will to probate as he is not and cannot be a party to the proceedings. *Heilman v. Jones*, 5 Redf. 398.

Under his power to vacate a decree the surrogate may in his

discretion vacate a decree admitting a will to probate, though more than a year has expired. *Becker v. Bochus*, 5 Redf. 488.

The application should be to open the decree, not to revoke probate. *Matter of Odell*, 1 Powers, 408.

Trial of preliminary issue of relationship.

A petitioner moving to open and vacate a decree granting probate, where his interest is denied, must prove his right as a preliminary issue, and cannot have that issue tried by a jury. *In re Reinhardt*, 92 Misc. Rep. 96, 156 N. Y. Supp. 171.

Citation.

A citation to vacate a decree of probate need be directed to those only who are parties to the proceeding. *Hopkins v. Lane*, 6 Dem. 12, 3 N. Y. Supp. 661, 19 N. Y. St. Repr. 528.

Evidence of genuineness of signatures of testator and witness.

Where a will is being probated after many years, without doubt the deposition of witnesses taken on the former probate, the decree of probate and the will may be received in evidence as bearing upon the question of the genuineness of the signatures of such persons. See §§ 151, 153, ¶ 74.

Papers on file in New York county surrogate's office.

By section 389 of the Civil Practice Act papers on file in the New York County Surrogate's offices for more than twenty years may be offered and received in evidence as presumptive proof of the facts therein set forth.

It was held, however, in *Robinson v. Supreme Commandery*, 77 App. Div. 215, aff'd without opinion, 177 N. Y. 564, that this section must be given a limited construction where it was inconsistent with section 834, of the Code of Civil Procedure, (relating to privileges of physicians now § 351, Civ. Pr. Act), a certificate of death in that case being rejected.

In *Lalor v. Tooker*, 130 App. Div. 11, a petition for administration filed in New York county was received as presumptive evidence of death.

¶ 74 Recording Wills Admitted to Probate in the State; Will or the Record May be Read in Evidence.

Wills to be recorded and retained; exception.

Every will admitted to probate, together with the decree, order or judgment admitting it to probate shall be recorded in the proper surrogate's court. Where a written will is proved, it must be filed and remain in the surrogate's office. But when it shall be shown, by affidavit or otherwise, to the satisfaction of the surrogate, that the decedent left real or personal property in another state or territory of the United States or in a foreign country, and that the laws of such state, territory or country require the production of the original will before the provisions thereof become effective, the surrogate may, at any time after probate, and upon such notice to the parties interested in the estate as he may think proper, cause any original will remaining on file in his office to be sent by post or otherwise to any court which, or to any officer of such state, territory or country who, under the laws thereof, is empowered to receive the same for probate, or may deliver such will to any person interested in the probate thereof in such state, territory or country, or to his representative, upon such terms as he shall think proper for the preservation of the will and the protection of other parties interested in the estate.

§ 150 *Sur. Ct. A.*. Former § 2620, *Code Civ. Pro.*

The recording of proofs is eliminated. Where the trial was had in another court, and any order or judgment made and certified to the surrogate's court, such order or judgment together with the decree must be recorded.

Wills must be retained on file in surrogate's office.

Except in those cases where a necessity arises for sending a will to another court, a will must remain in the surrogate's office. It is considered by many real estate lawyers that the continued custody of the original will by the surrogate will be a great protection to all titles to real estate.

Recording will probated in supreme court.

A copy of the will so established or if it is lost or destroyed, the substance thereof, must be incorporated into a final judgment * * * and the surrogate must record the same * * * .

Part of § 203, Dec. Est. L. Formerly part of § 1864, Code Civ. Pro.

Recording wills proved in any court in the state. Executor must cause will of real estate to be recorded.

A will of real property, which has been, at any time, either before or after this chapter takes effect, duly proved in the supreme court, or the court of chancery, or before a surrogate of the state with the certificate of proof thereof annexed thereto, or indorsed thereon or an exemplified copy thereof, may be recorded in the office of the clerk or the register, as the case requires, of any county in the state, in the same manner as a deed of real property. Where the will relates to real property, the executor or administrator with the will annexed, must cause the same, or an exemplified copy thereof, to be so recorded in each county where real property of the testator is situated, within twenty days after letters are issued to him. An exemplification of the record of such a will, from any surrogate's or other office where the same has been so recorded, either before or after this chapter takes effect, may be in like manner recorded in the office of the clerk or register of any county. Such a record or exemplification, or an exemplification of the record thereof, must be received in evidence, as if the original will was produced and proved.

§ 42, *Decedent Estate Law*.

Must be recorded within twenty days.

The requirement that the executor, or administrator with the will annexed, must cause any will relating to real estate to be recorded in the clerk's office of each county where property exists which is affected by it, is not generally complied with, but should be promptly met. Since now the will itself cannot be so recorded, an exemplified copy should be obtained, which consists of a copy of the will, and the usual certificates by the surrogate and the clerk of the court. It is the usual practice to record a certified copy in the county of probate.

A will not recorded in the county clerk's office is not constructive notice, even though recorded in the surrogate's office. *Taylor v. Millard*, 118 N. Y. 244; aff'g, 42 Hun, 363.

Index and fees.

Upon recording a will or exemplification, as prescribed in the last section, the clerk or registrar must index it in the same books and substantially in the same manner, as if it was a deed recorded in his office.

§ 43, *Decedent Estate Law*.

Expenses of recording wills.

The necessary fees for preparing and recording copies of wills are a proper charge as expenses of administration and

will be allowed in the accounts of the representative under the authority of § 285. (¶ 135).

Recording wills proved elsewhere within the state.

A certified copy of a will of real property, proved and recorded in any court of the state of competent jurisdiction, must be recorded upon the request of any person interested therein, in the office of the county clerk or register as the case requires of any county in which real property of the testator is situated.

§ 152, *Sur. Ct. A.* Former § 2622, *Code Civ. Pro.*

For a "transcript" a certified copy has been substituted, and the requirement that there also be recorded all notices, process and proof has been omitted. The place of recording has been changed from the surrogate's office to the office of the clerk or register of the proper county. As neither this section nor the former provides that any proceeding be founded upon such a record, it seems useless to permit a person to demand that the papers be recorded in the surrogate's office.

Will certified, or record thereof, may be read in evidence.

The surrogate must cause to be indorsed upon, or annexed to, the original will admitted to probate, or the exemplified copy, or statement of the tenor of the will, which was admitted without production of an original written will, a certificate, under his hand, or the hand of the clerk of his court, and his seal of office, stating that it has, upon due proof, been admitted to probate, as a will valid to pass real or personal property, or both, as the case may be. The will, or the copy or statement, so authenticated, the record thereof, or an exemplified copy of the record, may be read in evidence, as proof of the original will, or of the contents or tenor thereof, without further evidence, and with the effect specified in this act.

§ 151, *Sur. Ct. A.* Former § 2621, *Code Civ. Pro.*

Where this section refers to certifying the record of a will that has been admitted to probate without the production of the original written will, it refers to those cases where the will has been proved in some other court, or has been proved as a lost or destroyed will, or is a nuncupative will, and does not refer to the wills which are filed by exemplified copy for the purpose of making evidence thereof.

The certificate must state the substance of the requirement but no form is prescribed. *King v. King*, 39 Hun, 220.

The record of a will may be overcome by evidence. The record contained the names of two persons as devisees — the proof was that there were three names. The will itself was lost. *Naylor v. Brown*, 32 Misc. Rep. 298, 66 N. Y. Supp. 729.

Records of certain wills heretofore proved; how far evidence.

The exemplification of the record of a will, proved before the judge of the former court of probate, and recorded in his office before the first day of January, in the year seventeen hundred and eighty-five, certified under the seal of the officer having custody of the record, must be admitted in evidence in any case, after it has been made to appear that diligent and fruitless search has been made for the original will.

A certified copy of the last will and testament of any deceased person, which has been admitted to probate, whether as a will of real or personal property, or both, and recorded in the office of the surrogate in any county of this state, shall be admitted in evidence in any of the courts of this state, without the proofs and examination taken on the probate thereof, and whether such proofs shall have been recorded or not, with like effect as if the original of such will had been produced and proven in such court, when thirty years have elapsed since the will was admitted to probate and recorded. And the recording of such will shall be evidence that the same was duly admitted to probate. The exemplification of the record of a will which has been proved before the surrogate or judge of probate, or other officer exercising the like jurisdiction of another state must, when certified by the officer having by law, when the certificate was made, custody of the record, be admitted in evidence as if the original will was produced and proved, when thirty years have elapsed since the will was proved. § 153, *Sur. Ct. A.* Former § 2623. *Code Civ. Pro.*

¶ 75 Recording Will Proved in Another State for the Purpose of Making Presumptive Evidence of Title to Real Estate Situated in This State.

Where real property situated within this state, or an interest therein, is devised or made subject to a power of disposition by a will in writing, subscribed by the testator, duly executed without the state in conformity with the laws of this state or of the place where executed or of the testator's domicile, and admitted to probate without the state and filed or recorded in the proper office as prescribed by the laws of the state, territory or foreign country where the will was probated, a copy of such will or of the record thereof and of the proofs or of the records thereof, or if the proofs are not on file or recorded in such office, of any statement, on file or recorded in such office, of the substance of the proofs authenticated as prescribed in section forty-five of this chapter, or if no proofs and no statement of the substance of the proofs be on file or recorded in such office, a copy of such will or of the record thereof, authenticated as prescribed in said section forty-five, accompanied by a certificate that no proofs or

statement of the substance of proof of such will, are or is on file or recorded in such office, made and likewise authenticated as prescribed in said section forty-five, may be recorded in the office of the surrogate or of any county in this state where such real property is situated; and such record in the office of such surrogate or an exemplified copy thereof shall be presumptive evidence of such will and of the execution thereof, in any action or special proceeding relating to such real property.

§ 44, *Dec. Est. L.*

A change in this section has been made with reference to the manner of execution of a will to be recorded under this action. Formerly no will could be so recorded unless it was executed in conformity to the laws of this State. Now it may be recorded if the will is in writing, signed by the testator, duly executed without the State in conformity with the laws of this State, or of the place where executed or of the testator's domicile, and if it has been duly probated without the State. A further change has been made in that the person executing it out of the State need not be a nonresident of the State.

Recording of will does not give jurisdiction to grant original or ancillary letters. See ¶ 111.

No authority to issue letters is to be gathered from this provision which refers to the recording of a will probated without the State relating to real estate situated within the State. This section provides the method of making a record of such a will and no further action is required to make that record effectual than the filing thereof under conditions and provisions mentioned in the statute. Compliance with its requirements furnishes evidence of a record title to real estate precisely in the same way that the recording of a deed would. It is made by the statute presumptive evidence of the will and of the execution thereof in any action or special proceeding relating to such real property. Ancillary letters testamentary or ancillary letters of administration are based upon the existence of personal property. They are simply for the purposes of administration. The surrogate has nothing whatever to do with real estate of a testator under this section.

His jurisdiction is merely to have a will recorded in compliance with its provisions. *Spratt v. Syms*, 104 App. Div. 232, 93 N. Y. Supp. 728.

A notarial will, one which is executed and filed and becomes thereby effective in a foreign country, is not duly "probated" within the meaning of that word as used in our statute. *In re Connell's Will*, 221 N. Y. 190, revg. 92 Misc. Rep. 324, 175 App. Div. 986.

Application to have exemplified copy recorded to make prima facie evidence of title.

The application to the surrogate should be made by duly verified petition, which should set forth the preliminary facts which authorize the action of the surrogate in spreading the exemplified copy of will and proofs upon the records of the Surrogate's Court. Such petition should show that there is real property situated within the county of the surrogate which is devised or made subject to a power of sale in a written will executed without the State in conformity to the laws of this State, or of the State or country where executed, or where the testator was domiciled, stating place and date of death, alleging original probate, with date and place, together with other facts necessary and proper to be brought to the attention of the surrogate. *Matter of Shearer*, 1 Civ. Pro. 455; *Matter of Nash*, 37 Misc. Rep. 709, 76 N. Y. Supp. 453.

It is not required that the method of proof in the foreign State shall conform to our law in that regard, since there need be no sworn written testimony of the witnesses, and it would also seem that two witnesses need not be sworn where the foreign law does not require it.

The following cases upon the question of proof that the will was executed in accordance with the laws of this State no longer apply in that particular. *Matter of Coope*, 53 Misc. Rep. 509, 103 N. Y. Supp. 431; *Bradley v. Krudap*, 128 App. Div. 200, 112 N. Y. Supp. 609; *Meiggs v. Hoagland*, 68 App. Div. 182, 74 N. Y. Supp. 234, 178 N. Y. 564; *Matter of Langbein*, 1 Dem. 448.

Authentication of papers from another state or foreign country for use in this state.

To entitle a copy of a will admitted to probate or of letters testamentary or of letters of administration, granted in any other state or in any territory of the United States, and of the proofs or of any statement of the substance of the proofs of any such will, or of the record of any such will, letters, proofs or statement, to be recorded or used in this state as provided in article seventh of title third of chapter eighteenth of the code of civil procedure or in section forty-four of this chapter, such copy must be authenticated by the seal of the court or officer by which or whom such will was admitted to probate or such letters were granted, or having the custody of the same or of the record thereof, and the signature of a judge of such court or the signature of such officer and of the clerk of such court or officer if any; and must be further authenticated by a certificate under the great or principal seal of such state or territory, and the signature of the officer who has the custody of such seal, to the effect that the court or officer by which or whom such will was admitted to probate or such letters were granted, was duly authorized by the laws of such state or territory to admit wills to probate or to grant letters testamentary or of administration and to keep the same and records thereof; that the seal of such court or officer affixed to such copy is genuine, and that the officer making such certificate under such seal of such state or territory verily believes that each of the signatures attesting such copy is genuine; and to entitle any certificate concerning proofs accompanying the copy of the will or of the record so authenticated, to be recorded or used in this state, as provided in said article or section, such certificate must be under the seal of the court or officer by which or whom such will was admitted to probate, or having the custody of such will or record, and the signature of a judge or the clerk of such court, or the signature of such officer, authenticated by a certificate under such great or principal seal of such state or territory, and the signature of the officer having the custody thereof, to the effect that the seal of the court or officer affixed to such certificate concerning proofs is genuine, and that such officer making such certificate under such seal of such state or territory, verily believes that the signature to such certificate concerning proofs is genuine. To entitle a copy of a will admitted to probate or of letters testamentary, or of letters of administration, granted in a foreign country, and of the proofs or of any statement of the substance of the proofs of any such will, or of the record of any such will, letters, proofs or statement, to be recorded or used in this state, as provided in said article or section, such copy must be authenticated in the manner prescribed by the laws of such foreign country, and must be further authenticated by a certificate of a judge of a court of record or by the chief officer of the department of justice of such foreign country to the effect that such authentication is in conformity with the laws of such foreign country, and that the court or officer by which or by whom such will was so admitted to probate, or such letters were granted, was duly authorized by the laws of such foreign country to admit wills to probate, or to grant letters testamentary or of administration, and to keep the same and records thereof; and the signature and official

character of such judge or court of record or of such chief officer of the department of justice shall be attested by a consular officer of the United States, resident in such foreign country, under the seal of his office; and to entitle any certificate concerning proofs accompanying the copy of the will or of the records so authenticated, to be used and recorded in this state, as provided in said article or section, such certificate concerning the proofs must be similarly authenticated and attested.

§ 45, *Dec. Est. L.*

CHAPTER XX.

Grant and Issue of Letters Testamentary. How a Testamentary Trustee Qualifies and How His Successor is Appointed.

- ¶ 76. Character and source of authority of executor.
What constitutes an appointment.
- ¶ 77. § 155. When letters testamentary may be issued.
Trust company may act.
- § 169. Security required from an executor acting as trustee, and from a testamentary trustee.
- § 156. Issue of supplementary letters.
- ¶ 78. § 157. Executor failing to qualify or renounce, how excluded.
- § 158. Renunciation and retraction.
- ¶ 79. § 167. How a testamentary trustee shall qualify.
- § 170. Effect of separation of offices of executor and testamentary trustee.
- ¶ 80. § 168. Appointment of successor trustee.
Jurisdiction of supreme and surrogate's court.
When trust vests in the supreme court.
Trust must be alive.
Testator may nominate a successor trustee.

¶ 76 Character and Source of Authority of an Executor; What Constitutes the Appointment.

The power of a testator over his estate, the care and management as well as the ultimate disposition and distribution of it, is unqualified and absolute save only as restricted and limited by statute. To many a testator the selection of an honest and qualified person to act as executor, is almost as important as the final distribution of the estate. It is often of the utmost importance that a fit and proper person act as the executor, for the ultimate value of the estate for distribution may depend upon the competency and activity of the representative. There are also often the best of reasons why such management should be taken from the members of the family of the deceased and given to a person more competent or more free from family influence or prejudice. Testators

are therefore allowed to commit the administration of their estates and the care of their property to those individuals selected by them who in their judgment will protect and husband the property and carry out the terms of the will.

The authority of the executors is derived from the will and not from the letters testamentary issued by the surrogate. The latter are but the authentic evidence of the power conferred by the will, and are founded upon the probate of the instrument. It is true that executors are not permitted to exercise their powers except to a very limited extent, until proof of the will and the granting of letters testamentary. But this does not effect the character of the office or detract from the efficacy of the will as the source of the power. An executor derives power from the will, but an administrator owes his to the appointment of the surrogate.

Mr. Surrogate Fowler in *re Leland*, 96 Misc. Rep. 419, 160 N. Y. Supp. 372, discusses the office and estate of an executor, and says: "At common law an executor derived exclusively from the will itself an estate in his office as executor. His office or estate did not depend on probate of the will or on any grant of letters testamentary; it flowed exclusively from the will itself. *Hartnett v. Wandell*, 60 N. Y. 349, and it vested in the executor from the moment of the testator's death. It is said by Chancellor Kent that an executor is *jure gentium* and is only confirmed by a court of probate. I have called the executor's rights in and to his office an estate, because common-law books so call it, doubtless using estate primarily in the old sense of status, but also in the secondary sense of property, in instances where freeholds are devised to the executor for the purpose of sale. In all the particulars just indicated the old common law remains in force in this State, except where changed by statute. I am aware of nothing changing the common-law rule that an executor derives his office and estate from the will, and not from probate, or from the issuance of letters by this court. *Hartnett v. Wandell*, 60 N. Y. 346, 349; *Van Schaack v. Saunders*, 32 Hun, 520; *Matter of Greeley*, 15 Abb. Pr. (N. S.) 393.

The nominated executor ought not to ignore the trust reposed in him.

The testator having selected an executor, relies upon him to have the will probated and to have its provisions executed after probate. He may have special reasons for his selection and great confidence in the person named. Too often the person thus selected fails to appreciate the duty devolving upon him and treats the appointment with indifference and neglect, often refusing to offer the will for probate or to qualify as executor.

Expense of unsuccessful application for probate.

A person named as executor ought to apply for probate of the will, and the necessary expenses incurred will be allowed from the estate. See § 278, ¶ 153. If it happens that the will fails of due proof, and the estate passes into other hands, the expenses may be paid by the administrator. After the decision of *Dodd v. Anderson*, 131 App. Div. 224, 115 N. Y. Supp. 688, was reversed in 197 N. Y. 466, the code provision was amended so that an executor might in a proper case be allowed his disbursements in a proceeding to obtain probate of a will.

What is an appointment of executor.

A direction in a will that the public administrator shall sell all real and personal estate is an appointment of the public administrator as an executor of the will. *Baker v. Baker*, 18 App. Div. 189, 45 N. Y. Supp. 870; app. dism., 157 N. Y. 671.

A person is appointed executor in a will which says: "I request that Mr. D. shall have charge of my estate." *Matter of Buchan*, 16 Misc. Rep. 204, 38 N. Y. Supp. 1124.

Under a will which nominates as executors the trustees for the time being of a certain lodge, those persons who are trustees at the date of testator's death are thereby appointed and they continue as such executors until discharged. *Matter of Hardy*, 2 Dem. 91.

Where a banking corporation is named as executor and it is afterward merged with a trust company, such trust company

does not become entitled to act as executor. *Matter of Stikeman*, 48 Misc. Rep. 156, 96 N. Y. Supp. 460.

A direction to E. M. D. "to invest all my property" with other expressions in a will — *held* sufficient to make him executor. *Matter of McDonnell*, 2 Bradf. 32.

A will drawn in France which makes the husband "general and universal legatee" is a sufficient appointment of such husband as executor. *Matter of Blancon*, 4 Redf. 151.

A provision in a mutual will that the survivor shall remain in full possession of all the estate is a sufficient appointment of executor. *Matter of McCormick*, 2 Bradf. 169.

A will which devises real estate only, but appoints an executor, creates an executor for the personal estate and letters issued will apply to both. *Matter of Maccaffi*, 57 Misc. Rep. 264, 107 N. Y. Supp. 1115.

Substituted executor named in the will.

An executor to act upon the death of a first executor named in the will having been designated his appointment was made after the death of the first executor. *Matter of Cornell*, 17 Misc. Rep. 468, 75 N. Y. St. Rep. 664, 41 N. Y. Supp. 255.

Will naming successors should be construed liberally to accomplish its purposes to provide a continuous administration. *Matter of Coudert*, 153 App. Div. 196, 138 N. Y. Supp. 296.

More than one executor may be named.

The law of this State permits a testator to nominate and appoint one or more executors. When this power is exercised, and more than one individual is named, the testator says, in effect, that he is unwilling to trust the carrying out of his desires to one individual, but that he intrusts it to the harmonious action of those whom he names; that while there are reasons why he desires the services of each, he is unwilling that any one of them should be controlling; that he desires his estate administered, not by the arbitrary will of one, but by the will of all as modified and matured by mutual consultation. One of them may be venturesome and aggressive,

another timid, and a third the embodiment of courage and decision, and it is the combined qualities of these individuals which he desires in his executor, for in contemplation of law there is but one executor, no matter how many individuals may be involved. The testator calls together those whose judgment, integrity, and business capacity command his approval and says to them, in effect: "I want you to join with each other in determining all questions arising under my will, the manner of dealing with my estate. I do not want the arbitrary judgment of any one of you, but the harmonious action of all in administering my estate and producing the best results for my creditors and beneficiaries." *Matter of Waterbury*, 112 App. Div. 313, 315.

Power to nominate an executor may be given by will.

A testator in providing some one to execute his will is not limited to the designation by name and the direct appointment of an executor, but he may by his will delegate the power of naming an executor to another.

Where a person has power of appointment of an executor, and makes such appointment, the person so appointed must qualify in the regular way. *Matter of Richardson*, 8 Misc. Rep. 140, 59 N. Y. St. Repr. 483, 29 N. Y. Supp. 1079.

A. named his wife as executrix and requested "that such male friend as she may desire shall be appointed with her as executor," — *held*, that letters issued to such appointee were valid. *Hartnett v. Wandell*, 60 N. Y. 346, revg. 2 Hun, 552.

Executrix given the power to associate a male friend of her own selection. About a year after letters were issued to her, upon her petition letters were issued to a person thus selected by her. *Matter of Alexander*, 16 Abb. Pr. (N. S.) 9.

A change by codicil in the person in whose place as executor there was a power of appointment given does not revoke the power. *Cuthbert v. Babcock*, 2 Dem. 96.

¶ 77 Grant and Issue of Letters Testamentary.

When letters testamentary may be issued.

After a will has been admitted to probate any person entitled to letters thereunder who is competent by law to serve, and who appears and qualifies, is entitled to letters testamentary thereupon.

Where a judgment has been rendered in an action establishing a will the surrogate must record the will and issue letters thereupon as directed by the judgment.

A person entitled to letters upon a contingency may appear and show that the contingency has happened by which he is entitled to such letters.

A person named as an executor by a person other than the testator under a valid power contained in a will, must appear and file an acknowledged or proved, and duly certified selection of himself as an executor within fifteen days after the date of the decree admitting the will to probate, in default whereof the power of selection is deemed to have been renounced, unless for good cause shown the surrogate extends such time or relieves the default.

§ 155, *Sur. Ct. A.* Former § 2625, *Code Civ. Pro.*
and part of § 1864, *Code Civ. Pro.*

Who are incompetent to serve is set forth in paragraph 104.

For an instructive statement of the history of the issue of letters testamentary and the authority conferred see *Matter of Kennedy*, 106 Misc. Rep. 216, 174 N. Y. Supp. 429.

Will probated in supreme court. See ¶ 42.

Where probate is had in the supreme court that court by its judgment directs that the surrogate issue letters testamentary. §§ 202, 203, Dec. Est. L.

Notice of probate to legatees and devisees.

Before letters are issued, there shall be filed in the surrogate's court a written notice, entitled in the proceeding, stating the name of the testator, that his last will and testament has been offered for probate, or probated, as the case may be, and the name and post-office address of the proponent, and of each and every legatee, devisee or other beneficiary, as set forth in the petition, who has not been cited or has not appeared or waived citation, with proof by affidavit of the mailing of a copy of such notice to each of said beneficiaries.

§ 146, *Sur. Ct. A.* § 2616, *Code Civ. Pro.*

The purpose of this section is to give persons interested who are not next-of-kin or heirs notice that they are inter-

ested in the will. To require them to be cited would in many cases make large unnecessary expense. This notice is not jurisdictional. It is feared that some legatees lose their legacies because they never have notice of the legacy and there is no judicial settlement of the estate.

Only those persons need be notified whose names and addresses are given in the petition. The notice is not jurisdictional and it is not necessary to do more than to take the names and addresses from the petition.

See § 148 where same notice is used in case of contest, ¶ 52.

Where a will is proved upon waivers or appearance, and the executor desires the immediate issue of letters while he is in the court, he may fill out the blank notice, and go out and mail it, and then make his affidavit of mailing and file it with the clerk. He may also mail the notices before the hearing, stating therein that he will offer the will for probate, and file the notice and proof of mailing when he comes in to make the proof. The section does not specifically state that notice may be given in advance where no citation is issued, but as the service of the notice is not jurisdictional, any proof that the object of the service of the notice has been complied with will be sufficient to authorize the clerk to issue the letters.

Where parties leave their papers to be entered and letters to be issued and mailed, the executor may mail the notices after leaving the court, and send in proof of mailing.

Incorporated society may act as executor.

The German Society of the City of New York, incorporated by special act of the Legislature in 1804, is authorized by the terms of its act of incorporation to act as executor. *Matter of Rath*, 107 Misc. Rep. 598, 176 N. Y. Supp. 887.

Trust company may act as executor or administrator with the will annexed.

The Banking Law contains provisions concerning the appointment and qualification of a trust company to act as executor, or administrator, with the will annexed. See ¶ 105.

The provisions of the Banking Law in relation to the appointment of a trust company as executor are in substance as follows:

Among the general powers of such a company is the power "to be appointed and to accept the appointment of executor of or trustee under the last will and testament, or administrator with or without the will annexed of the estate of any deceased person." Banking Law, § 185, subd. 6.

When any trust company is appointed executor in any last will and testament, the court or officer authorized to grant letters testamentary in this state, shall upon the proper application, grant letters testamentary thereon to such corporation or to its successor by merger. § 188, *Subd. 1, Banking Law.*

No bonds or other security shall be required, unless directed by the court upon proper application made. Section 188, subd. 6, Banking Law.

National banks may be authorized to act in a fiduciary capacity.

The superintendent of banks is authorized by section 248 of the Banking Law as amended by chapter 78, L. of 1920, to give permission to national banks to act in a fiduciary capacity in the same manner as trust companies.

Official oath not required.

"Upon the appointment of such trust company as executor, administrator, guardian, trustee, receiver or committee, no official oath shall be required."

From § 188, Subd. 10, Banking Law.

Substituted executor.

The testator may in his will name an executor to act upon the death of a nominated executor, and when that event happens, the substituted executor may apply for and receive letters upon proof of the death of the nominated executor, § 155. He should file a duly acknowledged designation of himself as executor by virtue of the provisions of the will within 15 days after the decree of probate.

Security to be required from a trustee or executor acting as trustee.

Whenever by or pursuant to any last will and testament, or by an order of the surrogate's court, a trustee is appointed or an executor is appointed who is required to hold, manage, or invest any money, securities or property real or personal for the benefit of another, such trustee, or executor, before receiving any such property into his possession or control shall, unless contrary to the express terms of the will, execute to the people of the state of New York, in the usual form, a bond with sufficient surety or sureties in an amount to be fixed by the surrogate. Upon any judicial settlement and partial distribution of such estate or fund the decree may provide for the discharge of the existing bond, and the filing of a new bond covering the amount still remaining in the hands of such executor or trustee.

This section shall not affect any executor or trustee named in a will executed before September first, 1914. § 169, *Sur. Ct. A. Farmer* § 2639, *Code Civ. Pro.*

This section requires all executors named in a will executed after September 1, 1914, who are to act in any manner as trustees to give security, unless contrary to the express terms of the will.

This will not apply to executors whose only duty is to settle the estate, without holding and investing funds. Where there are no trust duties connected with the office of executor, he will not be required to give a bond.

Upon admitting a will to probate the surrogate should examine the will and if it appears that the executor is or will be required to hold or invest any property or funds, so that a complete settlement and discharge cannot be had within one year at the longest, he should require the executor to execute and file a bond in a sum fixed by him, before letters are issued. This direction may be in the decree of probate, or in the order that letters testamentary issue.

A bond should be required where an executor is vested with title to personal property which he is to hold for any other purpose than to settle the estate, whether he holds it for his own use with remainder over to another, or holds it for the use of another.

An executor not required to give a bond under this section may still be required to give a bond under § 97 (¶ 105) when objections are made and sustained, as was the former practice. That bond is referred to in § 135, ¶ 91.

Security from testamentary trustee.

This section should be read with § 137, ¶ 79, as to how a testamentary trustee qualifies. The provision that upon judicial settlement a new bond for a lesser amount may be substituted will relieve the fund from the continued expense of a large bond as the fund is from time to time paid out.

When an executor becomes a trustee.

When an executor becomes a trustee is defined in this section as whenever he is required to hold, manage, or invest any money, securities or property, real or personal, for the benefit of another.

This distinction is discussed at ¶ 319.

Supplementary letters; executors not named in letters not to act.

If the disability of a person under age, or an alien named as executor in a will, be removed before the execution of the provisions of such will is completed, he shall be entitled, on petition being filed setting forth the facts to supplementary letters testamentary, to be issued in the same manner as the original letters, and authorized to join in the execution of the will with the persons previously appointed. A person named in a will as executor, shall be deemed to be superseded by the issue to another person of letters testamentary, and shall have no power or authority whatever as such executor until he appears and qualifies..

§ 156, *Sur. Ct. A.* Former § 2626, *Code Civ. Pro.*

Letters may be subsequently issued to an executor who has renounced. See § 158, ¶ 78.

¶ 78 Proceeding to Require Executor to Qualify; Renunciation and Retraction.**Executor failing to qualify or renounce, how excluded.**

If a person named as executor in a will, does not qualify or renounce within fifteen days after probate thereof; or if a person chosen by virtue of a power in the will, does not qualify or renounce within fifteen days after the filing of the instrument designating him; or, in either case, if objections are filed, and the executor does not qualify or renounce, within five days after they are determined in his favor, or, in a case specified in section 97 of this act, within five days after an objection has been established; the surrogate must, upon the application of any other executor, or any creditor or person interested in the estate, make an order requiring him to qualify within a time therein specified;

and directing that, in default of so doing, he be deemed to have renounced his appointment. Where it appears, by affidavit, or other written proof, to the satisfaction of the surrogate, that such an order cannot, with due diligence, be served personally within the state, upon the person therein named, the surrogate may prescribe the manner in which it must be served, which may be by publication. If the person, so appointed executor, does not qualify within the time fixed, or within such further time as the surrogate allows for that purpose, an order must be made reciting the facts, and declaring that he has renounced his appointment as executor. Such an order may be revoked by the surrogate in his discretion, and letters testamentary may be issued to the person so failing to renounce or qualify, upon his application, in a case where he might have retracted an express renunciation, as prescribed in the next section.

§ 157, *Sur. Ct. A. Former* § 2627, *Code Civ. Pro.*

Section analyzed.

If a person named as executor in a will does not within fifteen days after the probate thereof —

Qualify (§ 98), or

Renounce (§ 158),

Or if a person chosen by virtue of a power in the will (§ 155), does not qualify or renounce within fifteen days after the filing of the instrument designating him;

Or, if, in either case, he does not so qualify or renounce within five days after objections filed against him are determined in his favor, or are determined against him under section 97, the surrogate must upon the application of any other executor, any creditor, or person interested in the estate make an order requiring him to qualify within a time therein specified, and directing that in default of so doing he be deemed to have renounced his appointment.

Service of order.

The surrogate may prescribe the manner in which the order may be served where personal service cannot be made within the State. He may direct that it be by mail or personally without the State or by publication. If made by publication it would seem that the publication ought to be made in the usual manner and for the length of time required for service of a citation by publication, although there do not appear to be any decided cases upon the subject.

Order.

If such person fails to qualify within the time fixed or within such further time as the surrogate allows, an order must be made and recorded reciting the facts and declaring that he has renounced his appointment.

Revoking order.

Such order may be revoked upon application of such person in a case where he might have retracted an express renunciation as prescribed in section 158.

Renunciation by nominated executor; retraction thereof.

A person, named as executor in a will, may renounce the appointment by an instrument in writing, signed by him, and acknowledged, or proved, and duly certified, or attested by one or more witnesses, and proved to the satisfaction of the surrogate. Such a renunciation may be retracted by a like instrument, at any time before letters testamentary, or letters of administration with the will annexed, have been issued to any other person in his place; or, after they have been so issued, if they have been revoked, or the person to whom they were issued, has died, or become a lunatic, and there is no other acting executor or administrator. Where a retraction is so made, letters testamentary may, in the discretion of the surrogate, be issued to the person making it upon such notice as the surrogate may require. An instrument specified in this section must be filed in the surrogate's office.

§ 158, *Sur. Ct. A.* Former § 2628, *Code Civ. Pro.*

When retraction allowed.

A renunciation may always be withdrawn with the permission of the court before it is used and before legal rights have vested on the faith of it. *Matter of Treadwell*, 37 Misc. Rep. 584, 75 N. Y. Supp. 1058. See also 77 App. Div. 155.

When retraction not allowed.

Sole legatee renounced appointment as administrator with the will annexed and assigned her rights and interest in the estate—*held*, that she should not be permitted to retract such renunciation. *Matter of Clute*, 37 Misc. Rep. 710, 76 N. Y. Supp. 456.

After letters testamentary had been issued to him an executor filed a renunciation and account and his letters were

revoked—*held*, that he could not thereafter retract his renunciation and receive letters. *Matter of Suarez*, 3 Dem. 164.

An executor who has once acted and then been permitted to resign cannot afterward retract such resignation. *Matter of Beakes*, 5 Dem. 129.

A renunciation made in open court and acted upon by all parties was not allowed to be retracted. *Matter of Baldwin*, 27 App. Div. 506, 50 N. Y. Supp. 872; app. dism., 158 N. Y. 713.

Executrix renounced and afterward desired to retract. She was seventy years old, was beridden, and paralyzed—*held*, that she should not be allowed to retract. *Matter of Cornell*, 17 Misc. Rep. 468, 75 N. Y. St. Repr. 664, 41 N. Y. Supp. 255, 1 Gibb. Surr. Rep. 1.

¶ 79 How a Testamentary Trustee Qualifies. Effect of Separation of Offices When Same Person is Both Executor and Testamentary Trustee.

How testamentary trustees shall qualify.

A testamentary trustee named in a will or appointed pursuant to a power contained in a will or appointed by the surrogate shall, before exercising the

A trust company or other trustee exempted by law from taking an oath of office and such bond as may be required by the surrogate.

A trust company or other trustee exempted by law from taking an oath of office, and filing a bond, shall file a consent to accept such appointment duly executed and acknowledged. (In effect Sept. 1, 1920.)

§ 167, *Sur. Ct. A. Former § 2637, Code Civ. Pro.*

Section 169 (¶ 77) provides when the trustee may be relieved from giving a bond.

The theory of the law has always been that because a testator selects an executor or testamentary trustee he should not be required to give security for the funds coming to his hands. The results of the application of this theory have, in many cases, brought great hardship and dire disaster to many beneficiaries. No man can foresee his own future, and much less the future of another. Many a person whom we would

trust with our money to-day, we would not desire to handle it five years from to-day in the light of what we know at that time.

Therefore it is a dangerous principle to apply that because a testator selects a trustee, he should be allowed to receive funds five or ten years afterward without giving security.

No letters issued.

There is no special provision for letters to be issued to a testamentary trustee, and generally none is issued. The authority of the trustee to act is evidenced by a copy of the will and a certificate that he had been duly qualified, or by a copy of the order of appointment, where one is made, with a certificate attached signed by the clerk of the Surrogate's Court that the person named has duly qualified by filing his bond, duly approved, and his oath of office, and that he is entitled to act as such trustee under the order. In some cases a simple certificate of the clerk that the person has been duly appointed and has qualified and is entitled to act will be sufficient.

Retraction of renunciation by trustee.

When a trustee refuses to accept the trust, he cannot retract such refusal after the other trustees have acted as such. The only safe rule is to hold the person to his refusal or renunciation unless it is withdrawn before the others have acted. *In re Kellogg*, 214 N. Y. 460, 108 N. E. Rep. 844.

There is no statutory provision for the renunciation of a trustee. He derives his authority from the will, and may refuse to accept the trust.

Title where trustee renounces or refuses to act.

Where one of two or more trustees refuses to accept and execute the trust, the estate vests in the others, the same as though the trustee refusing to act were dead or had not been named. *Matter of Kellogg*, 214 N. Y. 460.

Trustee may receive property before accounting by executor.

It often happens, under some wills, that the trust duties, as to some matters, begin at once, and it would work harm to the interests of the parties if the performance of such duties should be postponed. Trustees may therefore act before the final accounting by the executor, and may receive and manage property. *Matter of Kellogg*, 214 N. Y. 460.

Application of this chapter.

The provisions of this act apply to a trust created by a will of a resident of the state, or relating to real property, situated within the state, without regard to the residence of the trustee, or the time of the execution of the will.

§ 171, *Sur. Ct. A. Former* § 2461, *Code Civ. Pro.*

The Court of Appeals has recently passed upon the construction of this section in relation to the jurisdiction of the Surrogate's Court to take the accounting of a trustee under a will of a non-resident who left no real property in the State, holding that there was no jurisdiction in such cases. This section confines jurisdiction to trusts under wills of residents, or relating to real property situated within the State. *People ex rel. Safford v. Surrogate's Court of Genesee Co.*, 229 N. Y. 495; rev'ing 192 App. Div. 949, 176 N. Y. Supp. 833.

Proceedings where testamentary trustee is also executor or administrator.

Where the same person is a testamentary trustee, and also the executor of the will, or an administrator upon the same estate, proceedings taken by or against him, as prescribed in this act, do not affect him as executor or administrator, or the creditors of, or persons interested in, the general estate, except in one of the following cases:

1. Where he presents a petition, praying for the revocation of his letters, he may, also, in the same petition, set forth the facts upon showing which he would be allowed to resign as testamentary trustee; and may thereupon pray for a decree allowing him so to resign, and for a citation accordingly.

2. Where a person presents a petition praying for the revocation of letters issued to an executor or administrator; and any of the facts set forth in the petition are made, by the provisions of this act, sufficient to entitle the same person to present a petition praying for the removal of a testamentary trustee; the petitioner may pray for a decree removing the person complained of in both capacities, and for a citation accordingly.

In either case, proceedings upon the petition for the resignation or removal, as the case requires, of the testamentary trustee, and for the judicial settle-

ment of his account, may be taken, as prescribed in this act, in connection with, or separately from, the like proceedings upon the petition for the revocation of the letters, as the surrogate directs.

§ 170 *Sur. Ct. A. Former* § 2640, *Code Civ. Pro.*

The expression "testamentary trustee" includes every person, except an executor and administrator with the will annexed or a guardian, who is designated by the will or any competent authority to execute a trust created by a will; and it includes such an executor or administrator where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator.

§ 314, *Sur. Ct. A., subd. 6. Former* § 2786, *subd. 6, Code Civ. Pro.*

A person is not a trustee simply because as executor he has trust duties to perform. *Oliver v. Frisbie*, 3 Dem. 22.

Executors and trustees may obtain release in a proper case in each capacity in one proceeding under this section. *Tilden v. Fiske*, 4 Dem. 357.

An executor will be considered a trustee where trust powers are conferred and trust duties imposed upon him not as incidents to his office of executor, but as belonging to an entirely distinct character—that of trustee *Hurlburt v. Durant*, 88 N. Y. 121; *Drake v. Price*, 5 id. 430.

The acceptance of the resignation of the trustee does not have the effect to relieve him from the execution, so far as it remains unexecuted, of the trusts which were devolved upon him by virtue of the office of executor. *Greenland v. Waddell*, 116 N. Y. 234.

¶ 80 When a Successor Testamentary Trustee May be Appointed; Proceeding Therefor.

Appointment of successor.

When all the persons named in a will as testamentary trustees die prior to the probate of the will, or by an instrument in writing renounce the appointment, or when no testamentary trustee is named in a will to execute a trust created therein, or when all the testamentary trustees die or become incompetent, or are by a decree of the surrogate's court, removed or allowed to resign, or where one of two or more persons named in a will as testamentary trustees dies prior to the probate of the will, or by an instrument in writing, renounces his or their appointment, or where one of two or more testamentary trustees dies or becomes a lunatic, or is by decree of the surrogate's court removed

or allowed to resign, and the trust has not been fully executed, the surrogate's court may appoint a trustee or successor or successors, unless such appointment would contravene the express terms of the will, or in a case where there is a trustee in office, unless all the beneficiaries waive such appointment in writing. Until a successor is appointed the remaining trustee or trustees may proceed and execute the trust. The trustee or successor may be appointed upon the application of any person interested and upon notice to such persons as the surrogate may designate.

§ 168, *Sur. Ct. A.* Former § 2638, *Code Civ. Pro.*

This section allows the appointment by the surrogate of a successor trustee in any case where there is no trustee in office qualified to act and the trust has not been fully executed, including a case where there was no trustee named in the will. In that respect it differs from the former section which seemed to contain some limitations on the power of the surrogate.

It also gives the power to appoint a trustee to act with one or more trustees, where one has died or has resigned, unless against the express terms of the will, or against the wishes of the beneficiaries. Under the former law, where one trustee remained in office no appointment could be made unless in accordance with an express direction in the will or on the opinion of the court that another trustee should be appointed.

The result was that, while the testator desired to commit the trust to the management of two or more trustees, the operation of the law often reduced this number to one, and consequently the danger from dishonesty or inability was greatly increased. Many funds would have been saved to the beneficiaries, if it had been the duty of the Surrogate's Court to continually keep two or more trustees in office.

A testamentary trustee is now required to give security under § 169, ¶ 77, and § 167, ¶ 79.

Filling vacancy; one or more trustees surviving. Decided under former § 2818, *Code Civ. Pro.*

Provision is made for appointing a substituted trustee to take the place of one of two or more trustees who may for any reason cease to be such trustee. Such an appointment

should be made when it is necessary to comply with the express terms of the will, or is for the benefit of the *cestui que trust*. *Matter of Dietz*, 132 App. Div. 641, 117 N. Y. Supp. 461; *Matter of Zerega*, 81 Misc. Rep. 113, 142 N. Y. Supp. 144.

An appointment will not be made solely because a beneficiary desires personal representation among the trustees. *Matter of Leavitt*, 135 App. Div. 7, 119 N. Y. Supp. 769.

Nor by the surrogate where there are already two acting trustees appointed by the Supreme Court.

Appointment of substituted trustee; jurisdiction of supreme and surrogate courts.

A general trust of either real or personal estate, including a testamentary trust, vests in the Supreme Court upon the death of the surviving or sole trustee, and the Supreme Court may appoint some person to execute such trust under the direction of the court. Real Property Law, § 111. Personal Property Law, § 20. *Matter of Waring*, 99 N. Y. 114.

Where the trustee is removed or allowed to resign, the Supreme Court may appoint a successor. Real Property Law, § 112.

When trust vests in supreme court.

On the death of a last surviving or sole surviving trustee of an express trust, the trust estate does not pass to his next of kin or personal representative, but, if the trust be unexecuted, in the absence of a contrary direction on the part of the person creating the same, it vests in the supreme court and shall be executed by some person appointed by the court, whom the court may invest with all or any of the powers and duties of the original trustee or trustees. The beneficiary or beneficiaries of the trust shall have such notice as the court may direct of the application for the appointment of such person; and the person so appointed shall give such security as the court may require, and shall be subject to the same requirements of law as to accounting and as to the administration of the trust as apply to testamentary trustees; and shall be entitled to such compensation for his services by way of commissions as may be fixed by any court which has power to pass upon his final account, which shall in no case exceed that now allowed by law to executors and administrators, besides his just and reasonable expenses in the matter in which he is appointed. § 20, *Personal Prop. Law*.

A similar provision as to trusts of real estate is found in Real Property Law, § 111.

No trustee named in the will.

The power to appoint trustees, where a trust is created by a will and no trustee named therein, is vested in the Supreme Court exclusively, as successor to the court of chancery. *Matter of Weed* (Jones' Will), 181 App. Div. 921, 167 N. Y. Supp. 862.

No doubt but that the foregoing decision and others like it led to the amendment of the law in 1919, whereby when no trustee is named in the will, the Surrogate's Court is given jurisdiction to appoint. See amended section 168, *ante*.

Trusts vesting in supreme court.

These statutes do not mean that all trusts vest exclusively in the Supreme Court. They are to be read with the provisions which give surrogates power to appoint trustees and settle their accounts. The powers of the Surrogates' Courts have been very thoroughly discussed in *Matter of Runk*, 200 N. Y. 447-451, from which can be obtained a much clearer understanding of these apparently conflicting provisions.

Notice of the application.

The statute provides that no person shall be appointed to execute the trust until the beneficiary thereof shall have been brought into court by such notice in such manner as the court may direct. It will be observed that in the case of real property the beneficiary must be brought into court by such notice as the court shall direct. The bringing of the beneficiary into court is not made a condition precedent to the power to appoint under the Personal Property Law, and consequently the court may appoint upon such notice as it may under the circumstances require. *Matter of Earnshaw*, 196 N. Y. 330.

Either court may exercise jurisdiction.

Regarding the appointment of substituted trustees and the settlement of their accounts, and the exercise of general control over their acts, the Supreme and Surrogate's Courts have concurrent jurisdiction, except in those cases where the

Supreme Court undertakes to exercise its jurisdiction in a given particular. The making of an appointment by the Supreme Court is not the taking over of the control of the trustee or of his accounts. A trustee may be appointed by the Supreme Court, but may account in the Surrogate's Court. *Matter of Runk*, 200 N. Y. 447; rev'g, 138 App. Div. 789.

Jurisdiction of surrogate's court and appointment of substituted trustee.

Where the trust is testamentary, the jurisdiction of the Supreme Court and of the Surrogate's Court is concurrent. *Weston v. Goodrich*, 86 Hun, 194, 67 N. Y. St. Repr. 127; *Matter of Hecht*, 71 Hun, 62, 54 N. Y. St. Repr. 194, 24 N. Y. Supp. 540.

Under former section 2818, Code Civ. Pro., later section 2638, the surrogate might appoint a substituted trustee of a testamentary trust in all cases where the Supreme Court had not assumed jurisdiction. But where the jurisdiction of the Supreme Court was invoked, its power to appoint a substituted trustee was limited to those cases where the trustee had been removed or had resigned. *Brater v. Hopper*, 77 Hun, 244, 28 N. Y. Supp. 472; *Willey v. Robinson*, 85 Hun, 362, 32 N. Y. Supp. 1018; *Jewett v. Schmidt*, 83 App. Div. 276, 82 N. Y. Supp. 49; *Royce v. Adams*, 123 N. Y. 402; *Tompkins v. Moseman*, 5 Redf. 402, 404.

The case of *Hoendle v. Stewart*, 84 App. Div. 280, 82 N. Y. Supp. 823, arose before the amendment of 1903, and is no longer an authority.

The surrogate has authority to appoint a substituted trustee upon the death of the trustee, even though the trust vests in the Supreme Court. *Matter of Chase*, 40 Misc. Rep. 616, 83 N. Y. Supp. 62.

Former section 2818, Code Civ. Pro., as it existed prior to 1893, made no provision for a case where one of two or more testamentary trustees renounced and failed to qualify, and prior to such amendment there was no provision authorizing one of such persons to properly dispose of the fund. The

section now provides that so long as one trustee remains in office, he may execute the trust powers. *Matter of Wilkin*, 90 App. Div. 324, 86 N. Y. Supp. 360.

Notice of the application.

To whom notice of the application shall be given rests in the discretion of the surrogate.

The surrogate may determine who shall be notified, but there are certain principles which should govern him in the exercise of his discretion, and he should require notice to be given to all persons whose interests would be naturally affected by the appointment. *Tompkins v. Moseman*, 5 Redf. 402; *Matter of Burk*, 1 N. Y. St. Repr. 316; *Matter of Gilbert*, 3 id. 208.

As a matter of practice an order is not void which appoints a new trustee before the entry of the order removing a prior trustee, providing his accounts have been settled. *Conant v. Wright*, 22 App. Div. 216, 48 N. Y. Supp. 422; aff'd, 162 N. Y. 635.

A surrogate has power to appoint a successor to a sole testamentary trustee who dies, and an eight-day notice of the application ought to be given to the beneficiary. The executors of the will of the deceased trustee are not proper parties. *Matter of Valentine*, 3 Dem. 563.

The appointment of a substituted trustee should be upon notice to interested persons. A person contingently interested in the residuary estate is entitled to notice. *Matter of Bartells*, 109 App. Div. 586, 96 N. Y. Supp. 579.

Trust must be alive.

In *Yates v. Thomas* (35 Misc. Rep. 552, 71 N. Y. Supp. 113), it was claimed that on the death of an annuitant the trust then and there ceased and terminated, and that, as the remaindermen were then entitled to an immediate delivery of the *corpus*, there was no unexecuted trust over which the surrogate had jurisdiction to appoint a trustee. But in that case the will provided that upon the death of the annuitant

the trustee was to pay and divide the trust estate among certain persons in certain proportions, and the court held that as the provision for division and paying over had not been complied with the trust was still unexecuted and the surrogate had power to appoint a substituted trustee.

Will directed executor to pay semi-annually the income of a part of her estate to a person during life. Contest between executor *cum testamento annexo* and parties desiring a trustee appointed—*held*, that there was a trust and surrogate was sustained in appointing a trustee. *In re Hecht*, 71 Hun, 62, 54 N. Y. St. Repr. 194, 24 N. Y. Supp. 540.

A trust power may terminate upon the death of a trustee where the exercise of personal discretion is an element of the trust. See ¶ 333.

Where special confidence is reposed in an individual as distinct from his office so that the execution of the trust or power in trust is made expressly dependent upon the will of the grantee, it is necessarily personal and discretionary and does not pass to a substituted trustee. *Coleman v. Beach*, 97 N. Y. 545; *Sweeney v. Warren*, 127 id. 426; *Lahey v. Kortright*, 132 id. 450, 457; *Beekman v. Bonsor*, 23 id. 298, 303, 305, 318. It must be observed, however, that the mere fact that the exercise of the power calls for the exercise of discretion does not necessarily stamp the power as purely personal. In *Lahey v. Kortright* (132 N. Y. 450), the trustees were given power to sell and invest the proceeds “as they, in their discretion, may deem most for the interest of the parties interested.” There was a valid trust to pay income for life, and the court held the power of sale annexed to the trust in aid of its execution. Judge Bradley (at p. 456) says: “While a mere power of sale is discretionary and does not survive the donee of the power, it is otherwise when the power is coupled with a trust. Then it is taken by the trustees and through the court of equity may be transmitted to their successors in the trust.” In *Kortright v. Storminger* (49 Hun, 249), the court, construing the same power, held that it was

imperative and general and although like all powers in trust, it was discretionary, it could on the death, removal, or resignation of the trustees be executed by a trustee appointed by the court to carry out the trusts created by the will. The element of personal confidence was lacking. Whether the power in trust is confided to the individual is a question of intention to be ascertained from the terms of the trust instrument. Where the instrument provides that the trustees are to act upon their determination of an ascertainable fact, the trust is not personal, but where their action rests entirely upon their personal discretion, no one can be substituted for them. The distinction is clearly set forth in *Hull v. Hull* (24 N. Y. 647). The bequest to the executors in that case was in trust to pay an annuity of \$500, to be increased in their discretion to \$1,000, to the testator's son till he attained the age of thirty years, and to pay all that should remain of principal and accumulated income to the son upon the condition that he should then, in the opinion of the executors, be solvent. The executors renounced and an action was brought to construe the will. It was held that the provision for the increase became ineffectual, the discretion being absolute and personal, and that the determination as to solvency of the son at the age of thirty was not personal as it rested upon a fact readily ascertainable. Judge Wright (at p. 651) says: "It may be conceded that when a matter or thing is to be determined or decided entirely by the personal discretion of one or more parties and they die or refuse to exercise this discretion, there is no way any determination or decision can be made. That provision of the present will which confides to the discretion of the executors an increase of the annual allowance to the son is of this description. But where a direction in a will is that the executors or trustees are to do or to determine upon any particular thing, and a rule is given, based upon facts readily ascertainable in the usual manner of legal determination of facts, then it is not a case of pure personal discretion, and the courts will uphold the will and order the facts, if disputed, to be determined in the usual way. * * *

The persons to whom, the time, amount, and conditions upon which the estate is to be finally disposed of are all plainly fixed by the will." Applying these rules, it is clear that the power given the executor to pay over to the son any part or all of the principal was personal to the trustee involving the exercise of his individual choice and discretion. It is made expressly dependent upon the will of the trustee "with the absolute right and power of deciding." It is not given in aid of a valid trust but, on the contrary, its exercise would immediately terminate the trust. Neither is its exercise dependent upon the determination of any ascertainable fact. *McLean v. McLean* (3 Hun, 395), affirmed by the Court of Appeals (62 N. Y. 627), although not involving the appointment of a substituted trustee, is peculiarly in point. *Benedict v. Dunning*, 110 App. Div. 303, 97 N. Y. Supp. 259; *Jones v. Dodge*, 69 Misc. Rep. 126, 126 N. Y. Supp. 181.

Testator may make provision for filling vacancies in office of trustee.

At common law a provision made in a will for filling vacancies in the office of trustee was good, and no statute has taken away that right. *Rogers v. Rogers*, 4 Redf. 521; *Hartnett v. Wandell*, 60 N. Y. 346; *Belmont v. O'Brien*, 12 id. 394.

Testator may authorize another person to name a trustee.

The donee of a power to name a trustee may exercise such power, and the Surrogate's Court could not require such appointee to give a bond under the former section. *Rogers v. Rogers*, 4 Redf. 521.

Trust company as trustee.

A trust company may be appointed as a trustee or successor trustee, and has certain special rights and privileges granted to it by the Banking Law. See ¶ 105.

Unincorporated society.

An unincorporated society cannot be a trustee. *Hart v. Hamburger*, 1 St. Rep. 293.

CHAPTER XXI.

Grant and Issue of Letters of Administration.

- ¶ 81, Necessity for grant of letters of administration.
- § 45. Exclusive jurisdiction.
- ¶ 82. § 48. Who entitled to letters.
- § 123. When county treasurer should be appointed.
- ¶ 83. § 119. Application for letters.
- § 120. Citation, and proceedings on return thereof.
- ¶ 84. Rights of consuls of foreign countries to make appointment.
- ¶ 85. Proceedings on appointment; proof required.

¶ 81 Jurisdiction to Grant Letters of Administration.

When no will is found.

All that is said in paragraph 177 concerning the duty of a nominated executor before probate of a will as to care and preservation of property applies to any person into whose possession or control any personal property of an intestate may come.

Before letters of administration are granted no person has a right to interfere with or dispose of personal property of the deceased person, but it is the duty of all persons in whose custody or control such property may be to protect and preserve it.

Necessity for administration.

If no will can be found and the deceased left any personal property, application should be made at once to the proper surrogate for letters of administration. If the deceased left no personal property, the fact that he did leave real estate does not make it necessary to take out letters of administration, for such letters give no authority to deal with real estate. *Hollingsworth v. Spaulding*, 54 N. Y. 636; *Dunning v. Ocean National Bank*, 61 N. Y. 497; aff'g, 6 Lans. 296.

The real estate of a person dying intestate descends at once to the heirs-at-law, whose right it is to at once enter upon the management, use, and enjoyment of the same.

If the deceased left no personal property, but left real estate and debts and funeral expenses unpaid, letters of administration should be taken out for the purpose of ascertaining officially the amount of all valid claims and the non-existence of personal property with which to pay them and of having a duly authorized person to institute and prosecute the necessary proceedings to sell the real estate for their payment.

No suit or proceeding can be brought to recover personal property left by an intestate except by an administrator duly appointed. See ¶ 178.

Even one next of kin cannot sue another to recover his interest in assets of the deceased, but such recovery must be had by an administrator duly appointed. *Palmer v. Green*, 63 Hun, 6, 43 N. Y. St. Repr. 86, 17 N. Y. Supp. 441.

Often it is necessary to appoint an administrator so that a note or mortgage may be collected and a valid receipt or release given therefor.

It is by no means necessary in all cases to administer upon an estate through the Surrogate's Court. Grant of letters should be withheld unless there is some substantial reason for their issuance. Where there are no debts, and the property is already distributed, and there are no suits to be brought, there can be no necessity for grant of letters. *Matter of Lossee*, 119 App. Div. 107.

Administration may be required for transfer tax proceedings.

Since the assets left by a person dying, beyond the amounts exempt, are subject to a transfer tax, it is often necessary or desirable to have administration in order to properly conduct the transfer tax proceedings.

If the assets are exempt from any tax, the tax commission will accept an affidavit making proof of the facts, and in some cases such affidavits will be accepted and the tax fixed without letters of administration being issued.

Small deposits in bank may be drawn without administration.

Recent amendments to the banking law have made it possible to withdraw small amounts on deposit to the credit of a deceased person without issue of letters of administration. This is done by furnishing to the bank certain information by affidavit and giving a bond to protect the bank in paying over the amount to a person apparently entitled thereto.

If any person shall die leaving in a savings bank an account on which a balance due him shall not exceed \$500, and no executor of his last will and testament or no administrator of his estate shall be appointed, the savings bank may in its discretion pay the balance of his account to his widow (or if the decedent was a married woman, to her surviving husband), next of kin, funeral director or other creditor who may appear to be entitled thereto. As a condition of such payment the savings bank may require proof by affidavit as to the parties in interest, the filing of proper waivers the execution of a bond of indemnity, with surety by the person to whom the payment is to be made, and a proper receipt and acquittance for such payment. For any such payment made pursuant to this subdivision the savings bank shall not be held liable to the decedent's executor or administrator thereafter appointed, unless the payment shall have been made within one year after the decedent's death and an action to recover the amount shall have been commenced within one year after the date of payment.

§ 248, *Sub. 4, Banking Law.*

Two hundred and fifty dollars may be paid under Workmen's Compensation Law without issue of letters.

In case of the death of an injured employee to whom there was due at the time of his or her death any compensation under the provisions of this chapter, not exceeding the sum of two hundred and fifty dollars, the amount of such compensation shall be payable to the surviving wife or husband, if there be one, or, if none, to the surviving child or children of the deceased under the age of eighteen years, and if there be no surviving wife or children, then to the dependents of such deceased employee or to any of them as the commission may direct.

From § 33, Workmen's Compensation Law.

Exclusive jurisdiction to take proof of will or grant administration.

The surrogate's court of each county has jurisdiction, exclusive of every other surrogate's court, to take the proof of a will, and to grant letters testamentary thereupon, or to grant letters of administration, as the case requires, in either of the following cases:

1. Where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere.
2. Where the decedent, not being a resident of the state, died within that

county, leaving personal property within the state or leaving personal property which has since his death, come into the state, and remains unadministered.

3. Where the decedent, not being a resident of the state, died without the state, leaving personal property within that county, and no other; or leaving personal property which has since his death, come into that county, and no other, and remains unadministered.

4. Where the decedent was not, at the time of his death, a resident of the state, and a petition for probate of his will, or for a grant of letters of administration, under subdivision two or three of this section, has not been filed in any surrogate's court; but real property of the decedent, to which the will relates, or which is subject to disposition under article thirteen of this act, is situated within that county, and no other.

§ 45, *Sur. Ct. A. Former § 2515, Code Civ. Pro.*

Refer to ¶¶ 17, 18, 19, where the general subject of jurisdiction is considered, with regard to the residence of the deceased and the location of property, all of which must be considered when application for letters of administration is about to be made.

Grant of letters on estates of Indians.

Where an Indian dies who is associated with a tribe which has no peacemaker's court, the Surrogate's Court of that county has jurisdiction to grant letters of administration upon the estate. *Matter of Printup*, 121 App. Div. 322, 106 N. Y. Supp. 74.

See an exhaustive study of the rights of Indians in our courts in *Hatch v. Luckman*, 64 Misc. Rep. 508, 118 N. Y. Supp. 689.

Application after revocation of probate.

Letters of administration applied for after prior letters have been revoked by the admission of a will to probate which in turn has been declared invalid, must be applied for and granted in the usual manner, and such letters are not revived by the judgment declaring such will invalid. *Belden v. Belden*, 118 App. Div. 296, 103 N. Y. Supp. 346.

Administration may be granted to prosecute action for negligent killing even though the deceased left a will.

In certain cases specified in section 130, Dec. Est. Law (¶ 417), an administrator may be appointed to prosecute an action for negligent killing of the testator. In such cases where the executor refuses to prosecute for the benefit of the husband or wife or next of kin, an administrator may be appointed specially for that purpose. See *post*.

¶ 82 Who Entitled to Letters of Administration.

Any person interested in the estate may apply for letters, but certain persons have a prior right over others, and that priority is defined in section 118, Surrogate's Court Act. Certain persons are held to be incompetent to receive letters, and they are described in section 94, ¶ 104.

Who entitled to letters of administration.

Administration in case of intestacy must be granted to the persons entitled to take or share in the personal property, who are competent and will accept the same, in the following order:

1. To the surviving husband or wife.
2. To the children.
3. To the grandchildren.
4. To the father.
5. To the mother.
6. To the brothers.
7. To the sisters.
8. To any other next to kin entitled to share in the distribution of the estate, preference being given to the person entitled to take the largest share in the estate, except as hereinafter provided.

If a person entitled to take all the personal estate is an infant, or an incompetent, or has died, his guardian, committee or legal representative, as the case may be, shall have a prior right to letters in his place and stead.

If all the persons entitled to take the personal estate are infants, or adjudged incompetents, or, if no adult or competent person entitled to take or share in the estate will accept the same, letters may be granted to the general guardian of an infant or to the committee of an incompetent, in the place of such infant or incompetent.

If no person entitled to take or share in the estate will accept the same or an appointment is not made by consent as hereinafter provided, then administration shall be granted as follows:

a. To the public administrator.

b. To the county treasurer of the county, or to the petitioner, in the discretion of the surrogate.

c. To any other person or persons.

If several persons have an equal right to administration, they must be preferred in the following order: First, men to women; second, relatives of the whole blood to those of the half blood; third, unmarried women to married. If there are several persons equally entitled to administration, the surrogate may grant letters to one or more of such persons. Administration may be granted to one or more competent persons, jointly with a person entitled upon the application of a person entitled to take or share in the personal property, or to a competent person or persons not entitled, upon the consent of all of the persons entitled to take or share in the estate who are within this state and competent, which consent must be in writing, and filed in the office of the surrogate. For the purposes of this section a trust company or other corporation authorized to act as administrator shall be included in the word "person." (Concluding paragraph of § 2588 amended. In effect April 14, 1920.) § 118, *Sur. Ct. A.* Former § 2588, *Code Civ. Pro.*

The general scheme of the section is to give only those persons the right to administer who have a money interest in the estate.

Subd. 3. The grandchildren are given preference over the father and others, because they take the property.

Subd. 8. Where next of kin of a more remote degree than sisters, take the property, preference is given to the one or more having the greatest interest.

Such preference does not apply to those described in the first seven subdivisions, as the statute has always recognized that they are entitled to preference by reason of close family relationship. The interest of persons of more remote kinship is generally one of money only, and hence the preference given to that one having the greatest money interest. A surrogate has no discretion, but must follow the order given in this section in making an appointment, unless the applicant is incompetent. *In re Brinckmann's Est.*, 89 Misc. Rep. 41, 152 N. Y. Supp. 542.

Joining other persons.

Another person may be joined with a person entitled on the application of the person entitled to take or share in the per-

sonal property. Neither under the present reading of the section can letters on such an application be issued to the person not entitled upon the failure of the person entitled to qualify. See *post*.

Letters to persons not entitled, by consent.

Letters may now be issued to a person not entitled alone, with the consent of all those entitled to share in the estate who are within the state and competent.

TRUST COMPANY is included in the word "person."

Special provision is made in the Banking Law, §§ 24-a, 185, 188, for the appointment of trust companies and certain banks as administrators. See ¶ 77.

INFANTS, INCOMPETENTS AND DECEASED NEXT OF KIN, may administer through their representatives when they take the whole estate; or where all the persons entitled to take are infants or incompetents, or where no competent person will serve, guardians or committees may be appointed.

Persons not entitled to take.

After the persons entitled to share in the estate, the right to administer passes to:

The public administrator;

The treasurer of the county, or the petitioning creditor;

Any other person.

The present section does not give a creditor an absolute right, but enables the surrogate to appoint the county treasurer as a responsible and careful representative (see § 123) or the petitioning creditor, in his discretion. The administration of an estate by a creditor is often unsatisfactory, but in some counties it would be impracticable to appoint the county treasurer. Where he can be appointed, he should be named and required to act. Being allowed the regular fees for his own use will overcome his objection to acting, and not being required to employ the county attorney will enable

him to employ the attorney for the creditor, who will in such case be willing to bring in the county treasurer to take the appointment.

A creditor is not a "person entitled to share in the personal property" of the deceased so that he has the right of administration prior to the public administrator. A creditor is entitled to file a petition for letters, but can only be appointed under the designation of "any other person or persons." *Matter of Morel*, 103 Misc. Rep. 555, 171 N. Y. Supp. 759.

Letters to a person not entitled on application of a person entitled, and his failure to qualify.

Under the former language of this section it was held that after an order is made granting letters to two persons, one entitled and one not entitled, the person entitled to letters may fail to qualify and so make the person not entitled sole administrator. *Matter of Ireland*, 47 Misc. Rep. 545, 95 N. Y. Supp. 1079.

In *Steele v. Leopold*, 135 App. Div. 247, 120 N. Y. Supp. 569, 572, the court allowed the letters of the party entitled to be revoked and the person joined to continue an action.

This practice has been looked upon with some disfavor by many surrogates as tending to allow an evasion of the order of priority.

The section uses such language that it is not expected this practice can be continued, and it largely takes away the motive for such evasion, by authorizing the appointment of a person not interested upon the consent of those interested who are within the State and competent.

Unmarried preferred to married.

Letters may be issued to an unmarried sister without notice to a married sister. *Matter of Curser*, 89 N. Y. 401; rev'g, 25 Hun, 579; over'g, 4 Redf. 496.

Half or whole blood.

The rule for determining whether a person is of the half or whole blood explained and applied. *Matter of Tator*, 81 Misc. Rep. 83, 141 N. Y. Supp. 927.

To a creditor.

A stock transaction held not to create a debt which entitled the alleged creditor to have letters of administration. *Estate of Frye*, 75 Hun, 402, 58 N. Y. St. Repr. 662, 27 N. Y. Supp. 14.

Corporation.

A corporation (excepting a trust company) is incompetent to receive letters. *Matter of Thompson*, 33 Barb. 334; aff'd, 28 How. 581; *Matter of Ciatto*, 105 App. Div. 143.

Estate of illegitimate.

If the deceased was illegitimate and leave a mother, and no child, or descendant, or widow, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.

§ 98, subd. 9, *Decedent Estate Law*.

An illegitimate child of the wife has no prior right to administration on the estate of his mother's husband. *Matter of Pfarr*, 38 Misc. Rep. 223, 77 N. Y. Supp. 326. See also 79 App. Div. 634, 79 N. Y. Supp. 639.

For purpose of bringing action.

If no person entitled to take the estate will accept the appointment, a person interested in bringing an action may have letters after the public administrator or county treasurer, under the right of any other person to have letters. By section 119 such person is given a special right to apply so that he may compel the taking out of letters by some one.

Action for damages for personal injury. See ¶¶ 19, 417.

When the husband, wife or next of kin do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.

From §130, Dec. Est. L. Former § 1902, Code of Civ. Pro.

Section 314, subdivision 13, includes such right of action in the term "personal property."

Notwithstanding the change made by chapter 295, L. of 1919, when the common law right of the husband of a woman dying without descendants was abrogated and his right in her personal estate was made the same as her right in his personal estate, section 103, Decedent Estate Law, was not changed and under it the husband has some special rights and his representative has a prior right to administration in certain cases. See ¶¶ 235, 454. The following cases were decided before the change in the distributive rights of the husband, but will be found still applicable in certain cases. *Matter of Thomas*, 33 Misc. Rep. 729, 68 N. Y. Supp. 1116; *Matter of Harvey*, 3 Redf. 214.

Since a wife takes the entire personal estate of her husband dying without descendants if the surplus is not over \$4,000, her administrator was granted letters *de bonis non* on the husband's estate. *Matter of Briasco*, 69 Misc. Rep. 278, 126 N. Y. Supp. 1001.

A step-son entitled to share in the estate under section 98, Dec. Est. L., subdivision 15-a, is entitled to letters of administration in preference to the public administrator. *Matter of Neukirchen*, 186 N. Y. Supp. 240.

Wife dying without next of kin or husband surviving, administration may be granted to the son of her husband by a former marriage, since under § 98, subd. 16, Decedent Estate Law, such son takes an interest in her estate. *Matter of Watson*, 161 N. Y. Supp. 875, 97 Misc. Rep. 538; aff'd, 175 App. Div. 956.

Effect of release of interest in estate by separation agreement.

A widow is entitled to letters of administration on her husband's estate, although in a separation agreement she has released her interest in his estate, if she did not also in terms renounce her right to administer. *Matter of Wilson*, 92 Hun, 318, 72 N. Y. St. Repr. 404, 36 N. Y. Supp. 882.

Effect of divorce.

A divorced wife, whether the divorce was granted because of the misconduct of herself or husband, is not entitled, if he dies intestate, to administration or to a distributive share of his personal estate. *Matter of Ensign*, 103 N. Y. 284.

A wife who has procured a divorce in another state, cannot claim the right to letters of administration on the estate of her divorced husband, as she is personally bound by the decree in her favor and cannot repudiate it. *Matter of Swales*, 60 App. Div. 599, 104 N. Y. St. Repr. 220, 70 N. Y. Supp. 220; aff'd 172 N. Y. 651.

An interlocutory decree, not made absolute does not dissolve the marriage and has no effect upon the rights of the parties. *Matter of Crandall*, 196 N. Y. 127.

A western divorcee married in this State held not to be entitled to letters of administration on the estate of the man so married in this State. *Matter of Kimball*, 155 N. Y. 62; aff'd, 18 App. Div. 320, 46 N. Y. Supp. 177.

County treasurer appointed administrator to qualify and have fees.

A county treasurer appointed administrator of an estate shall qualify in the manner prescribed in section 121; shall be vested with all the powers and rights of other administrators and be subject to the same duties and obligations; and shall be allowed the same fees for his services as are now allowed by law to administrators, which fees shall be in addition to the salary and fees now allowed by law to such county treasurer. Such treasurer may employ an attorney to act for him as such administrator other than the one, if any, appointed to act as the county attorney or the official attorney of such treasurer.

§ 123, *Sur. Ct. A. Former* § 2593, *Code Civ. Pro.*

See section 118, where county treasurer is given preference over general creditors, and section 120, ¶ 83, where he is not allowed to renounce except for good cause shown.

This section puts a county treasurer acting as administrator under the same rights and duties as any other administrator; he gives the same bond, and has the same fees.

¶ 83 Application for Letters and Citation Thereon.

Application for letters.

A creditor, or person interested in the estate of an intestate or interested in an action brought or about to be brought in which the intestate, if living, would be a proper party, may present to the surrogate's court having jurisdiction, a petition, praying for a decree awarding letters of administration, either to him, or to another person. A citation shall not be issued, and a decree shall not be made where a citation is not necessary, until the petitioner shows to the satisfaction of the surrogate, the existence of all the jurisdictional facts, and particularly that the decedent left no will.

§ 119, *Sur. Ct. A. Former § 2589, Code Civ. Pro.*

A creditor is given the right to apply for letters, and so force an appointment, but his right to have letters is not absolute. This is true also of a person interested in an action brought or about to be brought. As a person having a claim for funeral expenses is included in the definition of a creditor, reference to him is omitted.

Reference to contents of petition and right to subpoena witness, is included in sections 51, 20, ¶¶ 25, 6.

Application for letters.

Having determined who is first entitled to letters, or a person not prior entitled having decided to apply for letters, it becomes necessary to prepare the petition which must set forth all the facts upon which the jurisdiction of the surrogate depends

A creditor, or a person interested in the estate, or in an action to which the deceased would be a proper party, if living, may present the petition, praying for a decree awarding letters to him or to such other person or persons having a

prior right, as may be entitled thereto or in the alternative as the petitioner elects.

The petition should ask that all persons prior entitled, if any there be, should be cited and show cause why such a decree should not be made. A citation shall not be issued and a decree shall not be made where a citation is not necessary, until the petitioner presumptively proves by affidavit or otherwise to the satisfaction of the surrogate the existence of all the jurisdictional facts and particularly that the decedent left no will.

The petition must be in writing and verified.

It must set forth:

- a. The facts showing jurisdiction under sections 45, 46;
- b. The right of petitioner to apply;
- c. The names and relationship to deceased and places of residence of all persons entitled to share in the estate, which of them are adults and whether married or single, and which of them are minors and the names and residences of their guardians;
- d. The amount of the personal estate;
- e. That deceased left no will.

If all these facts are not fully known upon filing of a petition showing such facts as are known, the surrogate will issue a subpoena requiring the attendance of any persons for examination as to the facts necessary to be shown to the surrogate.

A petition that alleges that deceased left no *valid* will is sufficient to give jurisdiction to determine the question of intestacy. *Matter of Cameron*, 47 App. Div. 120, 62 N. Y. Supp. 187; aff'd, 166 N. Y. 610.

Where either party has been divorced.

The petition should show all the facts regarding a decree of divorce where either the husband or wife has procured such a decree. The mere fact that the survivor may not be

entitled to letters does not warrant the suppression of such facts.

The petition should show whether the alleged divorce is an absolute one or merely a separation, which party was the plaintiff, when and where it was granted.

Examination of bank books and securities.

A careful examination of the personal property should be made with a view to ascertaining its value, so that a correct statement may be made in the papers required to be presented to the court upon the application for letters. Care should be taken to examine all bank-books and to ascertain whether the spelling of the name of the depositor varies from the ordinary form used by him, and if it does both forms should be used in the application papers, *e. g.*, John Doe, sometimes spelled "Dough."

Citation; proceedings upon return thereof.

Every person, being a resident of the state and competent, who has a right to administration prior, or equal to that of the petitioner and who has not renounced, must be cited upon a petition for letters of administration; and where the petitioner is not entitled to share in the distribution of the estate there must also be cited all resident infants and adjudged incompetents who are so entitled. The surrogate may, in his discretion, issue a citation to non-residents, or those who have renounced, or any or all other persons interested in the estate. Where it is not necessary to cite any person, a decree, granting letters may be made on presentation of the petition. Any person who has a right to administration, prior or equal to that of the petitioner, may renounce his right by a written instrument, acknowledged, or proved and duly certified which must be filed in the surrogate's office; except that a public administrator or county treasurer may not renounce his right and may only be excused from acting as such upon his motion duly made and upon an order made and entered thereupon by the surrogate.

§ 120, *Sur. Ct. A. Former* § 2590, *Code Civ Pro.*

The section does not require citation to persons incompetent to take letters, unless application is made by a person not himself entitled. The provision of the former section that where the next of kin were not known, citation should be issued to all creditors and persons interested and served

by publication, is omitted, since the county treasurer is now authorized to receive letters in such a case, if there be no public administrator. Section 54 requires the Attorney-General to be cited in all cases where none of the next of kin is known. See also §§ 20, 40, 41, ¶¶ 14, 20.

Corporation creditor.

A corporation creditor (except a trust company or certain banks) is not entitled to letters or to notice of application for same. *Matter of Ciotto*, 105 App. Div. 143; *Matter of Thompson*, 33 Barb. 334; aff'd, 28 How. 581.

Citation.

Persons who must be cited:

a. Every resident of the State, who is not an infant or incompetent, who has a right to administration prior or equal to that of the petitioner and who has not renounced.

b. Where the surrogate is unable to ascertain whether the decedent left any person entitled to succeed to his estate, or if it appears that decedent left no known heirs or next of kin, citation must issue to

The Attorney-General (§ 54),

The public administrator and the county treasurer are given a prior right after the next of kin (§ 118).

Persons who may be cited if the surrogate so directs.

a. Nonresidents of the State who may be entitled to letters prior to or equally with petitioner.

b. Persons who have renounced.

c. Any person interested in the estate.

Renunciation.

Renunciation is made by a written instrument acknowledged and certified. See § 314, subd. 15.

The renunciation must be filed.

The renunciation of the only person entitled to take the estate does not permit the appointment *ex parte* of another

person. The consent should be filed as provided in the section. *Matter of Murphy*, 87 Misc. Rep. 564.

The county treasurer or public administrator cannot renounce his right, but may be relieved from serving by the court upon good reasons therefor being shown. The object of this prohibition is to obtain, when possible, the competent and disinterested services of a responsible person as administrator.

Administration—citation to county treasurer.

Where the person applying is not entitled to take or share in the estate, letters should not be granted to him without first citing the county treasurer. *In re Anderson*, 112 Misc. Rep. 686, 184 N. Y. Supp. 277.

Incompetent persons prior or equally entitled.

Because a person is alleged to be mentally or physically incompetent to act as administrator he does not lose his right to the appointment, until it is so adjudged by a court of competent jurisdiction. He should be duly cited and upon the return of the citation, evidence may be taken as to the mental and physical condition of such person, and if the proof requires it, the surrogate may find, that such person is incompetent to receive letters, or in a proper case if the party so cited makes default in appearing, letters may be granted to the applicant without such proof.

Infants and adjudged incompetents need not be cited, where the application is made by an adult competent person who is entitled to share in the estate. The amendment of this section seems to settle a question which was not clear under the former section. If, however, the infant incompetent takes the whole estate, or the application is made in any case by a person not entitled to take any part of the estate, then the infant or incompetent should be cited, and letters may issue to the guardian or committee.

Letters refused to a sister not entitled to share because of

the existence of infant children. In such case letters should be issued to the guardian or public administrator. *In re Elder's Estate*, 87 Misc. Rep. 79, 150 N. Y. Supp. 114.

Citing nonresidents equally or prior entitled.

The section makes it discretionary with the surrogate as to whether or not a citation shall issue to nonresidents having a prior right to administer.

Nonresidents who are citizens of the United States are entitled to letters in the order of priority named. *Matter of Page*, 107 N. Y. 266.

Prior to the provisions of the Code of Civil Procedure as enacted in 1880, the surrogate was required on an application for letters of administration to issue a citation to all persons having an equal or prior right to the petitioner to such letters even if such persons or some of them were nonresidents of the State. Former section 2663 of the Code of Civil Procedure so far as it gave the surrogate a discretion in regard to issuing a citation to nonresidents having an equal or prior right to the petitioner to such letters was new in 1880. The purpose of conferring such discretion was to avoid delay in administration when in the judgment of the surrogate it is unnecessary.

When a nonresident is entitled to administer the estate of an intestate as a matter of right, and he is without fault on his part the right cannot be taken away from him without notice. (*Matter of Tyers*, 41 Misc. Rep. 378.) If a surrogate exercising the discretion reposed in him by said section grants letters of administration to a person of inferior right without notice to a nonresident of superior right such appointment is regular so long as it remains unrevoked, but it is at all times subject to the right of the nonresident on proper application to receive an appointment superseding the first appointment providing such nonresident by laches or otherwise has not waived his right thereto. *Matter of Campbell*, 192 N. Y. 312; *Matter of Williams*, 44 Hun, 67, 8 N. Y. St. Repr. 437; *aff'd*, 111 N. Y. 680.

The section makes it discretionary with the surrogate as to whether or not a citation shall issue to nonresidents having a prior right to administer. The practice is to issue such letters to a resident without requiring service of a citation upon a non-resident, although he may have and does have a prior right, and the reason for this practice is that the estate may remain in the county and be distributed under the laws of this State, and particularly in order that it may be held here to answer just demands of the creditors of the deceased person. It is possible, and it has happened, that a nonresident representative will take the estate beyond the jurisdiction of the court, and it is exceedingly difficult under such circumstances to either enforce the demands of creditors or of those having a right to share therein. It is also true that nonresidence does not bar the right of a claimant to letters provided he is by law entitled thereto. *Matter of Tyers*, 41 Misc. Rep. 378, 84 N. Y. Supp. 934.

The issue of letters without issuing a citation to nonresident next of kin does not have the effect of absolutely cutting off their right to letters of administration. Rights in the nature of property rights may not be summarily disposed of without notice. The right of administration is one of this class. The commissions allowed for administering a large estate, the privilege of guarding and protecting property in which one may have a large interest, may make administration of the estate very important to the next of kin. Undoubtedly the discretion to dispense with citation by the surrogate is often very beneficial. In a small estate where the next of kin are nonresidents, the surrogate can safely assume that they will never appear to assert their rights. If the estate is likely to be expended in the payment of debts or any other reason exists indicating that those first entitled will probably not desire to avail themselves of the right to administration, the surrogate may dispense with citation to them. *Matter of Campbell*, 123 App. Div. 212; aff'd, 192 N. Y. 312.

Attorney-general.

Where it is alleged in the petition that the deceased had next of kin in a foreign country, the Attorney-General is not entitled to citation. *Matter of Davenport* (Hughes) 142 App. Div. 41, 126 N. Y. Supp. 693.

Citation to persons interested under an alleged will.

Where it is claimed that the deceased left a will, it is proper to cite the persons interested thereunder on the application for administration in order that the issue of intestacy may be properly determined. *Matter of Demmert*, 5 Redf. 299; *Matter of Cameron*, 47 App. Div. 120, 62 N. Y. Supp. 187; *aff'd*, 166 N. Y. 610.

¶ 84 Rights of Consuls of Foreign Countries to Intervene in the Appointment of Administrators Over Estates of Subjects of Those Countries.

The text of the treaty with any foreign country should be consulted in considering each case.

The provisions of these several treaties relate to personal property only, and the cases to wit: *Matter of Tartaglio* (12 Misc. Rep. 245); *Matter of Fattosini* (33 id. 18); *Matter of Lobrasciano* (38 id. 415); *Matter of Davenport* (43 id. 573), as well as the Massachusetts case reported in the New York Law Journal of April 16, 1906, are all administration cases and, therefore, decide the right of a foreign consul to take possession of a decedent's personal property under the provisions of the treaty with his country. *Matter of Peterson*, 51 Misc. Rep. 367, 101 N. Y. Supp. 285.

Treaty with Argentine Republic.

Under the "most favored nation clause," the treaty of 1853, between the Argentine Republic and the United States, provides as follows: "If any citizen of either of the two contracting parties shall die without will or testament, in any of the territories of the other, the consul general or consul of

the nation to which the deceased belonged, or the representative of such consul general or consul in his absence, shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs."

Under this treaty the consul general, or, in his absence, the consul, is given the right "to intervene in the possession, administration, and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs." *Rocca v. Thompson*, 223 U. S. 307.

Treaty with Austria-Hungary and other enemy countries.

Enemy countries with which we have no diplomatic relations are not represented in this country, and have no consuls who can act until new treaties are made or the former treaties reestablished.

Treaty with China.

Article II of the Treaty of 1904 between the United States and China gives to the consular officers of China the same attributes, privileges and immunities as are enjoyed by consular officers of other nations, and contains a reciprocal clause that in consideration of China's right to maintain consular officers in the United States the consular officers of the United States stationed in China "shall enjoy all the attributes, privileges and immunities, and exercise all the jurisdiction over their nationals which are or may be hereafter extended to similar officers of the nation the most favored in these respects." The provisions of this article of the treaty are to be construed as an equivalent for an equivalent, and as granting to Chinese consular officers the rights and privileges in regard to the administration of the estates of Chinese subjects dying intestate in this country enjoyed by nations the most favored in this respect. *Matter of Baglieri*,

137 N. Y. Supp. 175; *Matter of Jarema*, 137 N. Y. Supp. 176; *Matter of Tong*, Surr. Decs., N. Y. county and 48 N. Y. Law J., 1312.

Treaty with Greece.

Article 2 of the Consular Convention of 1902 with Greece, grants right of administration to the Grecian Consul. *Matter of Baglieri*, 137 N. Y. Supp. 175; *Matter of Jarema*, 137 N. Y. Supp. 176.

Treaty with Italy.

Our treaty with Italy has been construed to require the appointment of the Italian consul-general as administrator of the estates of all Italian subjects who leave no resident next of kin upon his giving security for the protection of all resident creditors.

Extract from the consular convention, stipulated on the 8th day of May, 1878, between the governments of the United States and Italy:

“In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, who has no known heir, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the Consul or Consular Agents of the nation to which the deceased belongs, to the end that information be at once transmitted to the parties interested.”

Italian consul given preference over a creditor. *Matter of Silvetti*, 66 Misc. Rep. 394, 122 N. Y. Supp. 400; *Matter of Scutella*, 145 App. Div. 156, rev'g, 69 Misc. Rep. 514.

These decisions were reviewed by the United States Supreme Court in *Rocca v. Thompson* (223 U. S. 307), and it was held that the Italian consul was not entitled to administration to the exclusion of those entitled to administration under the local laws.

Italian consul given preference over a resident cousin, not entitled to share in the estate. *Matter of Lombardi*, 78 Misc. Rep. 689, 138 N. Y. Supp. 1007.

In *Matter of D'Adamo* (212 N. Y. 214), the Court of Appeals intimated that the revision of 1914 might change the rule as laid down in that and other cases.

Treaty with Peru.

That treaty provides that "In the absence of legal heirs or representatives the Consul or Vice Consul of either party shall *ex officio* be the executor or administrator of the citizens of their nation who may die within their consular jurisdiction."

Not only may the consul take letters, but he may nominate a person to be appointed in his place.

In the *Matter of the estate of John Micale*, in the Surrogate's Court in the County of New York, Surrogate Fowler filed the following opinion:

"By virtue of the 'most favored nation' clause contained in article 7 of the treaty of 1878, between the United States and Italy there was secured to the latter country not only the benefit of article 9 of the treaty of 1853, made between the United States and Argentina, but also the provisions of article 10 of the treaty of 1859 between Uruguay and the United States, which recognized the right of the consul-general, consul or vice-consul of the former, or his representative, to name an administrator of the estate of a citizen of his nation who had died intestate in this country. Letters must therefore issue to the delegate of the Italian consul. *In re Nicola Abatangelo* (N. Y. Law Journal, May 3, 1911, decided by Surrogate Ketcham) is to the same effect. See also article 8, treaty of 1851, between the United States and Costa Rica." (N. Y. Law Journal, January 17, 1912, p. 1753.)

¶ 85 Proceedings on Appointment.

Where no citation is required, letters are granted upon presentation of petition and bond.

Where a citation is required, the surrogate on the return day must make such a decree as justice requires.

Any person interested may appear and make himself a party to the proceeding.

Letters must be granted to any party to the proceeding who appears to be entitled thereto.

Failure to cite a widow upon application for letters is an irregularity but does not render the letters issued void. *Kelly v. West*, 80 N. Y. 139.

Nonresidence is not a disqualification for receiving letters, notwithstanding the fact that the surrogate, in his discretion, need not cite nonresidents. *Matter of Williams*, 44 Hun, 67, 8 N. Y. St. Repr. 437, aff'g, 5 Dem. 292, 5 N. Y. St. Repr. 361; aff'd, 111 N. Y. 680.

If upon the return day of a citation the applicant does not appear, and the person cited does appear, a later grant of letters to the applicant in the absence of the person cited, no adjournment being had, is void. *Matter of Page*, 107 N. Y. 266.

The application should be granted, notwithstanding the fact that a person appointed in another State asks for ancillary letters. See section 160, subd. 2, ¶ 111. *Weed v. Waterbury*, 5 Redf. 114.

Proof required; contest.

Where a duly verified petition is presented alleging all the jurisdictional and other facts necessary to be proved and no issue is raised by any party as to the truth of such facts, the petition may be taken as presumptive evidence of all such allegations and letters may be issued without further proof. See § 76, ¶ 32.

The surrogate, in his discretion, may award administration without a personal examination of the person to whom it is awarded. If, however, any party to the proceeding files objections, which raise an issue as to any material allegation of the petition, the surrogate must proceed to try and determine the issues so raised. The power of the surrogate to issue letters gives him jurisdiction to try any issue which must be determined to enable him to exercise the power conferred.

Making proof of death. See ¶ 17.

Presumption of death. See ¶ 17.

Proof of domicile. See ¶ 18.

Proof that a person emigrated to New York and worked there and sent for his family to join him is sufficient *prima facie* proof to authorize grant of letters of administration. *Kennedy v. Ryall*, 67 N. Y. 379.

When letters of administration have been granted upon the estate of one dying intestate in the county of the surrogate, the burden is upon one disputing the title and authority of the administrator to show a want of jurisdiction in the surrogate to grant the letters. *Welch v. N. Y. C. R. R. Co.*, 53 N. Y. 610.

Presumption of marriage and legitimacy. See ¶ 23.

Where it is shown or conceded that the applicant for letters is the son of deceased, there is a presumption of law that he is a legitimate son, and those who allege illegitimacy have cast upon them the *onus* of establishing it. *Caujolle v. Ferrie*, 26 Barb. 177, aff'd, 4 Bradf. 28; aff'd, 23 N. Y. 90; *Tracy v. Frey*, 95 App. Div. 579, 88 N. Y. Supp. 874.

Without evidence it will be presumed that a marriage contracted in England valid under our law would be valid there. *Townsend v. Van Buskirk*, 33 Misc. Rep. 287, 68 N. Y. Supp. 512.

Presumption that second marriage long continued was legal has such strength that evidence should be produced by those attacking it. *Matter of Meehan*, 150 App. Div. 681, 135 N. Y. Supp. 723.

Proof of intestacy.

A petition that alleges that deceased left no *valid* will is sufficient to give jurisdiction to determine the question of intestacy. *Matter of Cameron*, 47 App. Div. 120, 62 N. Y. Supp. 187; aff'd, 166 N. Y. 610.

Intestacy as used in this section does not refer to property as being unbequeathed, but refers to the non-existence of a will.

A person is not "intestate" who leaves a will even if all his property is not given by the will, and in such a case letters of administration cannot be granted where an executor is named in the will. *Matter of Maccaffil*, 57 Misc. Rep. 264, aff'd, 127 App. Div. 21.

It is the duty of the surrogate to determine as a question of fact whether the deceased died intestate. When an alleged will is on file in his court or is brought to his attention, he cannot ignore that fact, but should then proceed to determine the issue upon notice to all interested parties. If after due notice no one institutes a proceeding to prove the will the allegation of the petition and the presumption as to intestacy will justify grant of letters of administration.

Failure to probate will after due notice.

By an amendment to § 139 (¶ 44) where a will has been filed in the surrogate's office for more than sixty days without application being made for its probate, the surrogate may direct the public administrator or county treasurer to petition for its probate.

The necessity for the administration of an estate sometimes makes it necessary to grant letters of administration where an alleged will is known to exist, since the persons interested under the will often refuse to offer it for probate. In such cases it is proper to have the will filed in the court, give notice requiring petition for probate to be filed with a time fixed, and to grant letters of administration if no proceeding is begun. *Matter of Carter*, 74 Misc. Rep. 1, 133 N. Y. Supp. 722.

Where the application is contested on the ground that a deceased died testate, there must be proof by the contestants that such will was not legally revoked, and the will itself must be proved, and unless this is done the person died intestate and the allegations of the petition will be deemed insufficient. *Matter of Demmert*, 5 Redf. 299.

No obligation rests upon the next of kin to cause the probate of a will in order to avoid administration being taken upon the estate, and where in answer to application for administration

the will is brought into court and filed, administration cannot be granted at once, even though the next of kin state that they do not intend to offer the will for probate. *Matter of Taggart*, 40 N. Y. St. Repr. 368, 16 N. Y. Supp. 514.

The presumption of intestacy continues until overcome by evidence, since under our statutes the existence of a valid will cannot be presumed, but it must be shown to have been executed and published as prescribed by law. *Matter of Cameron*, 47 App. Div. 120, 62 N. Y. Supp. 187; *aff'd*, 166 N. Y. 610; *Isham v. Gibbons*, 1 Bradf. 69; *Matter of Dressel*, 102 Misc. Rep. 648, 170 N. Y. Supp. 151.

Where a petition for administration alleged facts which cast grave doubt upon the validity of a will filed and all parties interested refused to probate the will, it was held that administration should have been granted. *Matter of Billet*, 187 App. Div. 309, 175 N. Y. Supp. 482, reversing 166 Misc. Rep. 229, 174 N. Y. Supp. 488.

Effect of supreme court judgment.

A judgment which among other things adjudged that a person died intestate was no bar to proof of a will. *Matter of Connell*, 75 Misc. Rep. 574, 136 N. Y. Supp. 166.

Administration, burden of proof.

The petitioner for letters of administration as against one prior entitled has the burden of proof that he is one of the persons entitled to apply for letters. *In re Greco's Est.*, 90 Misc. Rep. 241, 154 N. Y. Supp. 306.

CHAPTER XXII.

Bond and Oath of Administrator. Limited Letters and Bond Therefor. Public Administrators.

¶ 86. § 121. Oath and bond of administrator.

How penalty reduced.

¶ 87. § 122. Limited letters and bond.

¶ 88. § 124. Public administrator of Kings county.

§ 125. Public administrator of Erie county.

Public administrator of Richmond county.

¶ 89. Rights and duties of public administrator of New York county.

¶ 86 Bond and Oath of Administrator.**Administrator's bond.**

Before letters are issued to an administrator he must file his official oath, and execute to the people of the state, and file with the surrogate, the joint and several bond of himself and two or more sureties, in a penalty fixed by the surrogate, not less than the value of the personal property of which the decedent died possessed and of the probable amount to be recovered by reason of any right of action, granted to an executor or administrator, by special provision of law, or by reason of a cause of action which existed in behalf of decedent; except that where the person or persons about to be appointed is or are entitled to the whole estate, the surrogate may dispense with a bond or fix the penalty at such sum as will adequately protect the rights of all creditors. The sum to be fixed as the amount of the penalty must be ascertained by the surrogate, by the examination on oath of the applicant or any other person, or otherwise, as the surrogate thinks proper. The bond must be conditioned that the administrator will faithfully discharge the trust reposed in him as such and obey all lawful decrees and orders of the surrogate's court touching the administration of the estate committed to him.

In cases where the husband or wife and all the next of kin of the decedent or all the persons entitled to share in the estate consent, the penalty of the bond need not exceed double the amount of the claims of the creditors, against the estate, presented to the surrogate, pursuant to a notice to be published once a week for four weeks in such newspaper or newspapers as the surrogate shall direct, reciting an intention to apply for letters under this provision, and notifying creditors to present their claims to the surrogate's court on or before a day to be fixed in such notice, which shall be at least thirty days after the first publication thereof; but no bond so given shall be for less than five thousand dollars; and such bond may be increased by order of the surrogate for cause shown. Pending such application, no temporary administrator shall be appointed, except on petition of such next of kin.

§ 121, *Sur. Ct. A. Former § 2591, Code Civ. Pro.*

The requirement that the bond be in "twice" the value of the personal estate has been omitted, leaving the penalty of the bond at the value of the personal estate. Because of this reduction surrogates should be careful to see, where possible, that the full value of the property is stated, and where they have any reason to think it has not been fairly stated, should require a larger bond.

Where the persons to be appointed take the whole estate, the surrogate may dispense with a bond, or make it sufficient to protect creditors.

The portion of the section authorizing a reduction in the amount of the bond after advertisement for creditors has been changed so that publication of notice is required to be made only once a week for four weeks in such papers as the surrogate directs, instead of in several papers for four weeks. This section now can be made useful where otherwise a large bond would be required.

Administrator's oath. § 98, ¶ 105.

Before letters are issued, the applicant must file his official oath. The oath or affirmation must be to the effect that he will, faithfully and honestly discharge the duties of his office, and must be filed with the surrogate.

It may be taken before any officer within or without the State who is authorized to administer oaths.

A BANKING OR TRUST COMPANY NEED NOT TAKE THE OATH.
See ¶ 105.

Administrator's bond.

The bond must be the joint and several bond of himself and two or more sureties. The form of bond, affidavit of sureties, and approval are prescribed by Rule 25 of Civil Practice and § 105 Sur. Ct. A, ¶ 118. The general subject of security and bonds is considered in chapter XXIX, ¶¶ 118 *et seq. post*.

They must be proved or acknowledged as deeds are required by law to be proved or acknowledged; where such acknowledgment is taken without the county a certificate is required.

When a nominal bond may be accepted.

Rule 25 to which reference is made above is a general requirement as to all bonds and undertakings, unless otherwise provided by statute, but the Surrogates' Act makes generally special provisions as to bonds in proceedings in Surrogates' Courts. Bonds to be given by guardians by will or deed come under the special provision of section 188 and subdivision 15 of section 314, and a certificate is not required on those particular bonds, unless the acknowledgment is taken out of the State.

Often the persons who apply for administration take the whole estate, and no one needs the protection of a bond except the creditors. In such a case the petition for administration should set forth the names of the creditors and the amount of their claims and the funeral expenses. The surrogate may then fix the amount of the bond at such sum as will adequately protect these claimants. Letters should not be granted without bond, but the amount may thus be made nominal.

Penalty when full bond required.

The penalty must be not less than the amount of the personal property and of the probable amount to be recovered by any right of action granted by special provision of law, or which existed in behalf of decedent, unless limited letters are asked for, in which case it shall be a nominal sum, not less than the value of the existing personal estate.

How ascertained.

By examination on oath of the applicant or any other person, and for that purpose the surrogate may issue subpoenas.

Reduction of penalty by consent.

The penalty of a bond may be reduced to not less than \$5,000 where all the next of kin, or persons entitled to share in the estate, consent, and a notice is published once a week for four weeks in such newspapers as the surrogate may direct.

Such notice must recite the intention of the applicant to ap-

ply for letters under this provision, and must require the creditors to present their claims to the surrogate's court on or before a day to be fixed in such notice, which shall be at least thirty days after the first publication thereof. The penalty of the bond shall then be fixed at twice the amount of the claims so presented, but not less than \$5,000.

The penalty of such bond may be increased by order of the surrogate for cause shown.

Bond, when next of kin join a person not entitled.

If the next of kin wish to have joined with them, persons not entitled, it is necessary to give a full penalty bond, as such person would be entitled to handle the fund, and the others interested would have no protection. In such a case the regular bond should be given.

Bond signed by attorney.

Administrator's bond signed by an attorney at law as one of the sureties is not void under Rule 27 of the Rules of Practice, and an application to revoke letters for that reason should not be treated as an exception to the sufficiency of the surety. *Matter of Heinze*, 97 Misc. Rep. 525, 163 N. Y. Supp. 415.

A husband or wife may become surety on the bond of the other. *Matter of McMaster*, 12 Civ. Pro. 177; disapproved in *Matter of Grove*, 6 Dem. 369, 13 N. Y. St. Repr. 179.

Bond of consul of foreign country.

Many consuls when applying for letters, either general or limited, claim that they have a right to such letters without giving the same bond as would be required from any other applicant. There is no basis for such a claim, and letters ought not to be granted until such bond as the surrogate requires has been filed. The privilege of the consul extends to having letters issued to him, not to setting aside our laws and having letters issued upon different terms and conditions than those applying to our own citizens. Resident creditors receive no pro-

tection when a consul is appointed unless he gives a bond, and whatever may be said that by virtue of his office he ought not to be required to give a bond for the protection of the foreign next of kin, does not apply to creditors to whom the consul does not stand in any relation of confidence or trust.

The Italian consul has the right to administer on the estate of an Italian subject dying here and leaving next of kin in Italy upon giving a bond to secure resident creditors. *Matter of Fatotini*, 33 Misc. Rep. 18, 101 N. Y. St. Repr. 1119.

Italian consul given letters where public administrator has refused to act and upon giving the usual security. *Matter of Logiorato*, 34 Misc. Rep. 31, 103 N. Y. St. Repr. 507, 69 N. Y. Supp. 507.

¶ 87 Limited Letters of Administration.

Limited letters may be issued; bond.

Where a right of action is granted to an executor or administrator by special provision of law, or it is alleged that a cause of action existed in behalf of decedent, and it appears to be impracticable to give a bond sufficient to cover the probable amount to be recovered in the case of an executor, or such probable recovery and the existing personal estate in the case of an administrator, the surrogate may dispense with a bond, or fix the penalty at such sum as he shall deem sufficient, and issue letters which as to such cause of action shall be limited to the prosecution thereof, and restraining the executor or administrator from compromise of the action or the enforcement of any judgment recovered therein until the further order of the surrogate made upon filing satisfactory security. § 122, *Sur. Ct. A. Former* § 2592, *Code Civ. Pro.*

Under the wording of the right to limited letters as heretofore given, limited letters could be granted only in cases where there was an action for negligently causing death. Now the section is extended to cases where the deceased had in his lifetime a cause of action which survives. *Matter of Belotti*, 87 Misc. Rep. 81. (See § 89, ¶ 102.)

Therefore such cases as *Kirwin v. Malone*, 45 App. Div. 93, 61 N. Y. Supp. 844; *Matter of Halligan*, 50 Misc. Rep. 481, 100 N. Y. Supp. 622, and *Matter of Carter*, 74 Misc. Rep. 1, 133 N. Y. Supp. 722, no longer apply.

Where a foreign consul applies for limited letters he should be treated as to giving a bond, as any other applicant. See ¶ 86.

The distinction made between the case of an executor and that of an administrator, is that an executor gives no bond for the personal assets, so they should not be included in fixing his bond, but he should be required to give a bond for the recovery, because he is the appointee of the testator, and not of the next of kin who are entitled to the recovery.

Limited letters of administration.

Limited letters may be granted in three cases :

1. Where a right of action exists by special provision of law to the representative, or a cause of action by the deceased survives. See § 89, ¶ 102.

2. Where an appeal has been taken. See § 90, ¶ 102.

3. Where securities have been deposited with the county treasurer to reduce the penalty of a bond. See § 106, ¶ 119.

In the latter case the letters are not termed "limited," but they are such in effect, since as to the assets so deposited the administrator has no title, and he cannot sue upon them or receive payment thereof, until he has given further security and obtained an order from the surrogate permitting their withdrawal from the county treasurer. See ¶ 119.

Where general letters have been issued, but security has not been given to cover certain securities directed to be deposited under section 106, the letters so issued are in effect limited as to such assets. *Ditmas v. McKane*, 92 App. Div. 344, 86 N. Y. Supp. 1083.

Prosecution of action.

It is the purpose of the law to confer upon such an administrator only the right and power to prosecute the action for the purpose of obtaining judgment; he has no right to compromise the action or collect the judgment until authorized by the surrogate.

If a compromise and settlement is desired a petition setting forth the facts is presented with an additional bond, and, if

proper, an order is made permitting the compromise and removing the limitation.

A person acting under limited letters cannot issue execution to collect the judgment recovered. *Lambert v. Met. St. Ry. Co.*, 33 Misc. Rep. 579, 68 N. Y. Supp. 876; aff'd, 56 App. Div. 624, 67 N. Y. Supp. 1137.

The attorney for such an administrator has no greater right than his client and, therefore, he cannot collect the judgment and give a valid satisfaction therefor. *Lowman v. Elmira, C. & N. R. R. Co.*, 85 Hun, 188, 65 N. Y. St. Repr. 733, 32 N. Y. Supp. 579; aff'd, 154 N. Y. 765.

Defendant need not be named.

It is not required that the name of the person or corporation to be sued shall be stated in the petition or in the letters granted thereon. If the name of such person or corporation has been set forth in the papers and it is afterward ascertained that a mistake has been made in naming the party liable for the death, the fact that such statement has been made and, even though the letters have named the particular person or corporation, does not make the letters invalid, but the action may be maintained against the proper party. *Matter of Halligan*, 50 Misc. Rep. 481, 100 N. Y. Supp. 622.

The sole preliminary fact that is required to be set forth is the claim that the death of the decedent was wrongfully caused; and for this there is a cause of action under the provisions of the statute as the same has been incorporated into section 130 of the Decedent Estate Law.

Allegation as to bond.

It should appear by proper averments in the petition that it is impracticable to give a bond in the amount of the probable recovery as a basis for the exercise of the discretion of the surrogate to allow modified security.

Where there is also some personal estate, a bond is required in the penalty of the personal estate, and as to that the administrator is not restricted in the handling and administration thereof.

Effect on other personal property.

Letters limited to the prosecution of an action are general letters as to all other assets, and the administration as to those assets should proceed in the usual way.

Upon grant of limited letters a bond should be required for the amount of the existing personal estate, and the right of the administrator to administer such estate is not restricted. Application to compromise the claim or enforce a judgment should be granted on filing sufficient additional security. *Matter of Malloy*, 1 Dem. 421.

"Special provision of law."

This refers to a right of action granted to the representative, and not to a general cause of action.

The authority of the surrogate to issue limited letters in other cases discussed. *Matter of Carter*, 74 Misc. Rep. 1, 133 N. Y. Supp. 722.

Limited letters to administrator de bonis non.

Where an administrator who has had limited letters dies, and an administrator *de bonis non* is appointed, such letters may also be limited, and such administrator will have no power to satisfy a judgment recovered in a negligence action without the authorization of the Surrogate's Court. *Cunningham v. City of New York*, 148 N. Y. Supp. 170.

Limited letters testamentary or of administration where appeal has been taken. See ¶ 102.

An appeal does not stay the issuing of letters, but where an appeal has been taken such letters do not confer power to sell real property by virtue of the provision in the will or to pay or to satisfy a legacy or to distribute the unbequeathed property of the decedent, until after the final determination of the appeal and to the extent mentioned, the letters are in effect limited.

¶ 88 Public Administrators.

Nearly all the large counties now have public administrators whose duties and rights are prescribed by special enactments.

They conduct the administration of estates of persons who have no next of kin, husband or wife, or when those persons entitled to the estate are unknown or absentees.

In counties having no special public administrator the county treasurer of the county acts in the same capacity.

The public administrator or county treasurer is entitled to letters over any one of the next of kin, not entitled to share in the estate, and when such an application is made the next of kin need not be cited.

Irregular appointment.

The previous appointment of a public administrator does not make a later appointment of one entitled void but irregular, subject to reversal on appeal or to being vacated on proper application. *Power v. Speckman*, 126 N. Y. 354.

Public administrator of Kings county.

The surrogate of the county of Kings shall, on or before the nineteenth day of October, nineteen hundred and eleven, and every five years thereafter, except as hereinafter provided, appoint a suitable person as public administrator of said county to hold office for the term of five years unless sooner removed for cause, the said term beginning on the nineteenth day of October, nineteen hundred and eleven. In case of a vacancy in said office by reason of death, resignation or otherwise said surrogate shall fill the same by appointing a suitable person as public administrator for the full term of five years from the date of such appointment and qualification. Before entering upon the performance of the duties of his office the person so appointed must take and subscribe before the county clerk, or a justice of the supreme court, the constitutional oath of office, and execute a bond with sureties to be approved by a justice of the supreme court, to the county of Kings, in a penal sum of fifty thousand dollars, conditioned for the faithful discharge of all the duties of his office, and that he will fully and correctly account for and pay over all moneys and property that may come into his hands as such public administrator, according to law, which bond must be filed with the clerk of the county. He shall be entitled to retain from all moneys or property of any intestate that come into his hands after deducting all actual and necessary expenses the same commissions as are now allowed by law to executors or administrators, and he shall receive a salary for his services to be fixed by the board of

estimate and apportionment of the city of New York upon the recommendation of the surrogate of the county of Kings, the same to be raised and paid each year in the same manner as are other county charges. The public administrator shall not receive to his own use any fees or emoluments in addition to his salary, and he shall pay into the treasury of the city of New York all commissions and costs received by him from any source whatever; such payments shall be made monthly and shall be accompanied by a sworn statement in such form as the comptroller of the city of New York shall prescribe, showing in detail the costs and commissions received and allowed to him. A suitable office for said public administrator shall be provided for him in one of the county buildings in the county of Kings. The surrogate shall also appoint a counsel and clerk to said public administrator, their salaries to be fixed by the board of estimate and apportionment of the city of New York upon the recommendation of said surrogate and to be raised and paid each year in the same manner as are other county charges. He shall have the prior right and authority to collect, take charge of and administer upon the goods, chattels, personal property and debts of persons dying intestate, and for that purpose to maintain suits as such public administrator as any executor or administrator might by law in the following cases:

1. Whenever such person dies leaving any asstts or effects in the county of Kings, and there is no widow, husband or next of kin entitled to a distributive share in the estate of such intestate, entitled, competent or willing to take out letters of administration on such estate.

2. Whenever assets or effects of any person dying intestate, after his death, come into the county of Kings and there is no such person entitled, competent or willing to take administration of the estate. In such cases intestacy is presumed until a will is proved and letters testamentary issued thereon. All provisions of law conferring jurisdiction, authority or power on, or otherwise relating to the office of public administrator of the city of New York and to the office of public administrator in the several counties of the state, so far as applicable apply to and are conferred on the office hereby created. The surrogate of the county of Kings, in cases where now authorized by law to issue letters of temporary administration, may in his discretion issue letters or temporary administration to such administrator without further security than required by this section.

§ 124, *Sur. Ct. A.* Former § 2594, *Code Civ. Pro.*

The section construed.

The general guardian of an infant son is entitled to administer over the public administrator of Kings county. *Matter of Hudson*, 37 Misc. Rep. 539, 75 N. Y. Supp. 1053.

A brother of deceased who is not entitled to share in the estate cannot have letters over the public administrator of Kings county. *Matter of Gilchrist*, 37 Misc. Rep. 543, 75 N. Y. Supp. 1055.

Amendment of 1914.

The revision of 1914 changed the rule regarding nonresidents, so that the following decisions no longer apply.

Resident of Kings county died leaving personal property in New York county—nonresident son and public administrator applied for letters—granted to public administrator. *Taylor v. Pub. Adm.*, 6 Dem. 158, 13 N. Y. St. Repr. 176.

A sister who became a resident after the intestate's death, held to be entitled over the public administrator. *Matter of Arbuckle*, 77 Misc. Rep. 309, 137 N. Y. Supp. 683.

Public administrator of Erie county.

The surrogate of the county of Erie, shall, within ten days after September 1st, 1914, and every five years thereafter, except as hereinafter provided, appoint a suitable person as public administrator of and for said county, to take office immediately, and to hold office for the term of five years from the first day of January succeeding his appointment, unless sooner removed for cause.

In case of a vacancy in said office by reason of death or resignation or otherwise, said surrogate shall fill the same by appointing a suitable person as public administrator, to take office immediately upon his appointment and qualification, and hold for the term of five years from the first day of January succeeding his appointment, unless sooner removed for cause.

Before entering upon the performance of the duties of his office, the person so appointed shall take and subscribe before the county clerk, or a justice of the supreme court, the constitutional oath of office, and execute a bond, with sufficient sureties to be approved by a justice of the supreme court, to the county of Erie, in the penal sum of ten thousand dollars, conditioned for the faithful discharge of the duties of his office, and that he will fully and correctly account for and pay over all moneys and property that may come into his hands as such public administrator, according to law, which bond shall be filed with the clerk of said county.

Said public administrator shall be entitled to retain from all moneys or property that come into his hands, after deducting all actual and necessary expenses, the same commissions as are now allowed by law to executors or administrators, and all provisions of law conferring jurisdiction, authority or power on, or otherwise relating to, the office of public administrator of the city of New York and to the office of public administrator of the county of Kings, and in the several counties of the state apply to and are conferred on the office hereby created.

The surrogate of the county of Erie, where now authorized by law to issue letters of temporary administration, may, in his discretion, issue letters of temporary administration to such public administrator, without further security than required by this section. § 125, *Sur. Ct. A.* Former § 2595, *Code Civ Pro.*

This section creates a public administrator for Erie county, in very much the same language as used in the section regarding Kings county.

Public administrator in Bronx county.

Chapter 548, L. 1912, amended by chap. 825, L. 1913, provides for a public administrator in Bronx county.

The fees of the public administrator are governed by the special act. *In re Hammer*, 94 Misc. Rep. 36, 158 N. Y. Supp. 981.

The public administrator of Bronx county is entitled to letters of administration on the estate of an alien over the consul-general of the nation of which the decedent was a subject. *Matter of Comparetto*, 88 Misc. Rep. 369; *Matter of D'Agostino*, 88 Misc. Rep. 371.

It has been held that the revision of 1914 did not affect the fees of the public administrator of Bronx county (chap. 548, L. 1912, amended by chap. 825, L. 1913), which fixed such fees with reference to former section 2668, Code Civ. Pro. *In re Hammer*, 94 Misc. Rep. 36, 158 N. Y. Supp. 981.

A widow was appointed administratrix of her husband's estate of which she did not take the whole. She died. The public administrator was appointed *adm. de bonis non* in preference to the next of kin and representatives of the widow. *Matter of Friedleben*, 103 Misc. Rep. 588, 171 N. Y. Supp. 761.

Money in the hands of the public administrator of Bronx county to be distributed to unknown persons should be decreed to be paid into the treasury of the city of New York, and not into the State treasury. *In re Hammer*, 105 Misc. Rep. 721, 174 N. Y. Supp. 887.

Richmond county.

Richmond county public administrator created by special acts. See chap. 486, L. 1899 and chap. 412, L. 1910.

¶ 89 Public Administrator of New York County.

Public administrator of New York county.

See Chapter 230, Laws of 1898 and acts amendatory thereof.

Public administrator; commissions; fees.

The public administrator shall retain a commission, over and above all expenses, upon all moneys that shall come into his hands, at the rate of five dollars upon the hundred dollars, upon all sums received from any one estate not exceeding two thousand five hundred dollars, and upon all sums so received exceeding that sum, at the rate of two dollars and fifty cents upon every hundred dollars; which sums may be so retained in preference to any debts or claims excepting funeral charges. The public administrator shall not receive to his own use any fees or emoluments in addition to his salary, and he shall pay into the treasury of the city of New York all commissions and costs received by him from any source whatever; such payments shall be made monthly, and shall be accompanied by a sworn statement in such form as the comptroller of the city of New York shall prescribe, and such statement, with a detailed list of costs and commissions, shall be published in the city record monthly. The value of any real or personal property, and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions, except where said real or personal property has been specifically devised or bequeathed. *Laws 1898, Ch. 230, § 3, as amended by Laws 1919, ch. 334.*

The public administrator of New York county is not entitled to commissions on securities delivered in kind to a successor. *Matter of Brewis*, 168 N. Y. Supp. 1066; aff'd, 163 App. Div. 930, 170 N. Y. Supp. 1070; aff'd, 225 N. Y. 670.

In a contention between the State of New York and the city of New York for the payment to it of the balance of a fund, it was held that former section 2740, Code Civ. Pro., did not control such payment since by section 2771 of the same act it was specified that no special law applying to a county should be affected thereby. *Matter of Fox*, 105 Misc. Rep. 721, 174 N. Y. Supp. 887.

CHAPTER XXIII.

Grant and Issue of Letters of Temporary Administration, Administration with the Will Annexed, and Administra- tion De Bonis Non. Transfer Tax Affidavit.

- ¶ 90. § 126. Grant and issue of letters of temporary administration.
 § 121. How temporary administrator qualifies.
 § 124. How temporary administrator qualifies in Kings County.
 § 132. Requirements for serving notices.
- ¶ 91. § 133. Grant and issue of letters of administration with the will annexed.
 § 134. Citation to persons having a prior right.
 Who may have letters.
 § 135. How administrator with the will annexed qualifies.
- ¶ 92. § 136. Grant and issue of letters of administration *de bonis non*.
 ¶ 93. Transfer tax affidavit.

¶ 90 Grant and Issue of Letters of Temporary Administra- tion.

When and how temporary administrators may be appointed.

On the application of a creditor, or a person interested in the estate, the surrogate may, in his discretion, issue to one or more persons letters of temporary administration, in either of the following cases:

1. When for any cause, delay necessarily occurs in the granting of letters testamentary or letters of administration, or in probating a will.

An appointment of a temporary administrator, in a case specified in this subdivision must be made by an order, if a proceeding for grant of letters of administration or probate of a will is then pending. At least ten days' notice of the application for such an order must be given to each party to the proceeding who has appeared, unless the surrogate is satisfied by proof that the safety of the estate requires the notice to be shortened, in which case he may shorten the time of service to not less than two days. If no proceeding is pending application shall be by petition and a citation shall issue in the usual manner directed to the persons entitled to letters of administration in a case where no will is known to exist; or to the executor or executors, trustee or trustees if any, and such legates and devisees as the surrogate may direct to be cited, in cases where a will has been filed.

2. Where a person of whose estate the surrogate would have jurisdiction, if he were shown to be dead, disappears or is missing, so that, after diligent search, his abode cannot be ascertained, and under circumstances which afford reasonable ground to believe either that he is dead, or that he has become a lunatic, or that he has been secreted, confined, or otherwise unlawfully made away with; and the appointment of a temporary administrator is necessary

for the protection of his property, and the rights of creditors or of those who will be interested in the estate, if it is found that he is dead.

Application for such an appointment, in a case specified in this subdivision must be made by petition, in like manner as where an application is made for administration in case of intestancy; and the proceedings are the same as prescribed in this act, relating to such last-mentioned application.

Such an application for the appointment of a temporary administrator in either case may also be made, with like effect, and in like manner, as if made by a creditor, by the county treasurer of the county where the person whose estate is in question last resided; or, if he was not a resident of the state, of the county where any of his property, real or personal, is situated. A temporary administrator must qualify as prescribed in section 121 of this act with respect to an administrator-in-chief.

§ 126, *Sur. Ct. A. Former* § 2596, *Code Civ. Pro.*

It has heretofore been held that a temporary administrator could not be appointed by a Surrogate Court unless there was pending in that court an application for probate of a will or for the grant of letters of administration-in-chief. *Matter of Hill*, 43 Misc. Rep. 583, 89 N. Y. Supp. 552; *Tooker v. Bell*, 1 Dem. 52; *Saw-Mill Co. v. Dock*, 3 Dem. 55.

But in *Matter of Chittenden*, 76 Misc. Rep. 92, this rule was weakened.

This section has been so changed that these cases no longer apply. If a proceeding is pending an order is made in that proceeding; if none is pending a regular proceeding is instituted for the purpose of procuring temporary letters.

Where a county treasurer applies for letters, see also, § 123, ¶ 82.

If the issuance of letters is stayed, temporary administration may be granted. It is too narrow a construction to say that letters have been "granted," when their issue has been prevented. *Matter of Leland*, 175 App. Div. 58, 161 N. Y. Supp. 320.

Appointment of temporary administrator.

An application for the appointment of a temporary administrator may be made by:

- a. A creditor;
- b. A person interested in the estate.

A surrogate may in his discretion issue letters of temporary administration to one or more persons competent and qualified to serve as executors in either of the following cases:

1. When for any cause delay necessarily occurs in the granting of letters testamentary, letters of administration, or in probating a will.

In such a case, if a proceeding for probate or administration is pending, no new petition need be filed, but on notice, an order may be entered in the pending proceeding making such appointment. If no proceeding is pending, an application for temporary administration must be made by petition.

2. Where a person of whose estate the surrogate would have jurisdiction if he were shown to be dead;

a. Disappears or is missing so that after diligent search his abode cannot be ascertained and under circumstances which afford reasonable ground to believe either;

b. That he is dead; or

c. That he has become a lunatic, or

d. That he has been secreted, confined, or otherwise unlawfully made away with.

THE APPLICATION UNDER SUBDIVISION ONE must be made upon notice of not less than ten days given to each party to the proceeding who has appeared, unless the surrogate is satisfied by proof that the safety of the estate requires the notice to be shortened, in which case he may shorten the time of service to not less than two days.

The application should not be by petition but by a notice of motion such as is usually employed in other courts, founded upon an affidavit. Such a notice of motion is used very little in Surrogates' Courts, but could be more often employed with great gain to simplicity of practice. Usually where an application for certain relief is to be made in a proceeding already begun by petition, a notice of motion should be used and not another petition.

THE APPLICATION UNDER SUBDIVISION TWO must be made by petition in like manner as where an application is made for

administration in case of intestacy; and the proceedings are the same as prescribed for the grant of letters of administration in chief.

IT MUST APPEAR that the appointment of the temporary administrator is necessary for the protection of the property and the rights of creditors or of those who will be interested in the estate if it is found that the absentee is dead.

APPLICATION MAY BE MADE BY THE COUNTY TREASURER with like effect and in like manner as if made by a creditor where the person whose estate is in question last resided in his county; or if he was not a resident of the State, of the county wherein all his property, real or personal, is situated.

When application is made by the county treasurer, consult section 123, ¶ 82, concerning rights and duties of the county treasurer.

A TEMPORARY ADMINISTRATOR QUALIFIES as does an administrator-in-chief.

WHERE PROCEEDINGS FOR THE APPOINTMENT OF AN ADMINISTRATOR WITH MODIFIED SECURITY are pending, a temporary administrator shall not be appointed except on petition of next of kin. Section 121, Sur. Ct. A.

Notice of application.

Where only the proponent of the will has appeared, notice to the heirs-at-law and next of kin who have not appeared is not necessary. *Matter of Ashmore*, 48 Misc. Rep. 312, 96 N. Y. Supp. 772.

Where no proceeding is pending, notice of the application must be given as in case of an application for letters in chief.

When appointment will be made.

Where a considerable portion of testator's estate consists of unsecured notes, a temporary administrator will be appointed. *Matter of Eddy*, 10 Misc. Rep. 211, 64 N. Y. St. Repr. 7, 31 N. Y. Supp. 423.

Presumption of death; full letters.

Absence of seven years creates a presumption of death under certain conditions. See ¶ 17.

In such cases full letters may be applied for and granted.

White v. Emigrant, etc., 146 App. Div. 591.

Who should be appointed.

Where the only objection to the executor named in the will is that he may eventually be entitled to letters, that is a reason for rather than against his appointment. *Jones v. Hamersley*, 2 Dem. 286.

In case of conflicting interests a person interested in the estate will not be appointed. *Matter of Eddy*, 10 Misc. Rep. 211, 64 N. Y. St. Rep. 7, 31 N. Y. Supp. 423.

A person not interested in the litigation should be appointed in a case where fair objections exist to any of the litigants. *Mootrie v. Hunt*, 4 Bradf. 173; followed in 31 N. Y. St. Rep. 960; *Cornwell v. Cornwell*, 1 Dem. 1; followed in 9 N. Y. Supp. 748; *Matter of Stearns*, 31 N. Y. St. Rep. 960, 9 N. Y. Supp. 748.

Executor appointed where the allegations of influence were general and conjectural and the largest number of parties numerically and in amount of interest desired his appointment. *Matter of Hilton*, 29 Misc. Rep. 532, 61 N. Y. Supp. 1073.

In appointing a temporary administrator the surrogate is not limited in his selection to persons entitled to letters-in-chief, but may appoint any person qualified to serve as an executor. *Matter of Plath*, 56 Hun, 223, 31 N. Y. St. Rep. 101, 9 N. Y. Supp. 251.

Where allegations against the executor are vague and uncertain, he may still be appointed. *Haas v. Childs*, 4 Dem. 137.

How temporary administrator qualifies; bond; oath.

A temporary administrator must qualify as does an administrator-in-chief. See § 121, ¶ 86.

The surrogate of the county of Kings, in cases where now authorized by law to issue letters of temporary administration, may in his discretion, issue letters of temporary administration to the public administrator without further security than required by section 124, Sur. Ct. A.

Notices required by this article; how given.

A notice required to be given, as prescribed in this article, to a party other than the temporary administrator, must be served upon the attorney of the party to whom notice is to be given; or, if he has not appeared by an attorney upon the party in like manner as a notice may be served upon an attorney in a civil action, brought in the supreme court. But where the attorney or party to be served does not reside in the surrogate's county; or where the attorney for a party has died, and no other appearance for that party has been filed in the surrogate's office; the surrogate may, by order, dispense with notice to that party; or may require notice to be given to him in any manner which he thinks proper.

§ 132, Sur. Ct. A. Former § 2602, Code Civ. Pro.

Order appealable to the court of appeals.

An order granting temporary letters of administration is an order "finally determining a special proceeding" and is appealable to the Court of Appeals. *Matter of Shonts*, 229 N. Y. 374; *Matter of Leland*, 219 N. Y. 387.

¶ 91 Grant and Issue of Letters of Administration With the Will Annexed.

Letters of administration with will annexed; when and to whom granted.

If no person is named as executor in the will, or selected by virtue of a power contained therein; or if, at any time there is no executor, or administrator with the will annexed, qualified to act; the surrogate must, upon the application of a creditor of the decedent, or a person interested in the estate of the decedent, or having a lien upon any real property upon which the decedent's estate has a lien, and upon such notice to the other creditors and persons interested in the estate as the surrogate deems proper, issue letters of administration with the will annexed, as follows:

1. To an executor or administrator of a sole legatee and devisee named in a will or to the executor or administrator of a sole residuary legatee and devisee named in a will.

2. To one or more of the residuary legatees, who are qualified to act as administrators. A corporation which is a residuary legatee shall be qualified to act as such administrator, although not specially authorized by its charter or any provision of law.

3. If there is no such residuary legatee or none who will accept, then to one or more of the principal or specified legatees so qualified.

4. If there is no such legatee or none who will accept, then to the husband, or wife, or to one or more of the next of kin, or to one or more of the heirs or devisees so qualified.

If any of the above persons who would otherwise be entitled to letters is an infant or an adjudged incompetent, administration may be granted to his guardian or committee as the case may be, unless there is an adult or competent person equally entitled who will accept the same.

5. If there is no qualified person, entitled under the foregoing subdivisions, who will accept, then to the public administrator, and if there be none for the county to the treasurer of the county or to the petitioner in the discretion of the surrogate and if neither will accept, to any creditor or competent person designated by the surrogate.

Except as to the right of priority as provided in this section, the provisions of section 118 of this act, apply to an application for letters of administration with the will annexed.. § 133, *Sur. Ct. A. Former* § 2603, *Code Civ. Pro.*

This section has been amended to conform in many respects to the section on granting letters of administration (§ 118, ¶ 82) while preserving the right of priority which has always obtained. There has been added to both sections a provision that the county treasurer of the county should have a prior right to administration over general creditors, but whether a petitioning creditor or the county treasurer should be appointed rests in the discretion of the surrogate.

The section applied.

The provision in section 118 for joining a stranger with a person entitled to letters applies also to this section. *Matter of Moehring*, 24 Misc. Rep. 418, 53 N. Y. Supp. 730.

The order of priority is not affected by section 136. *Matter of Manley*, 12 Misc. Rep. 473, 68 N. Y. St. Repr. 136, 34 N. Y. Supp. 258; *Matter of Place*, 4 N. Y. St. Repr. 533; aff'd, 105 N. Y. 629.

Idem; renunciation or exclusion of persons having prior right.

Where a person applies for letters of administration with the will annexed, as prescribed in the last section, and another person has a right to the administration, prior to that of the petitioner, a citation must issue accordingly unless a renunciation acknowledged or proved and duly certified of every person having such a prior right is filed. The surrogate may in his discretion issue

a citation to a person equally entitled. The proceedings thereupon are the same as upon an application for administration upon the estate of an intestate.

§ 134, *Sur. Ct. A.* Former § 2604, *Code Civ. Pro.*

Letters may be granted without citation unless there is a person having a prior right who does not renounce. Where no executor is named in the will, or is alive, the petition for probate may ask to have letters issued.

Application.

Where there is a vacancy in the office of executor at the time application for probate is made, the petition for probate may contain the proper statements and may ask for the granting of letters of administration with the will annexed, and the citation issued thereon may give notice of such application, so that on the proof of the will letters may issue without further proceedings.

When petition and citation are required the proceedings are the same as upon an application for letters on the estate of an intestate.

Petition.

The petition should show that there is no person entitled to letters prior in right to the applicant, unless such person has renounced such right, and in that case such renunciation should be alleged and filed. *Matter of Sheldon*, 118 App. Div. 488.

The petition cannot ask that an accounting be had under section 257, as the two proceedings cannot be joined. *Popham v. Spencer*, 4 Redf. 399.

Person holding power of attorney may apply.

Petition may be presented by a person holding a proper power of attorney executed for such purpose by one entitled to letters. *Russell v. Hartt*, 87 N. Y. 19.

But not executed by an alien non-resident or other person not himself entitled to make the application.

Citation of infants who have prior right.

Since infants are given a clear right to administer through their guardians, it would seem to be a good practice, where an infant has a prior right to administration, to allow the guardian of such infant to take letters.

Where an application is made by a person who has not a right to letters prior to that of the infant, it would be good practice to issue a citation to all infants having a right prior to the applicant, requiring such infants to appear by their general guardian and apply for and take letters of administration on the estate of such deceased or to show cause why letters thereon should not be issued to the applicant.

Granted to guardian.

The claim of a guardian is secondary to that of an adult in the same class. *Cottle v. Van Derheyden*, 11 Abb. Pr. (N. S.) 17; *Matter of Morgan*, 8 Civ. Pro. 77, 2 How. Pr. (N. S.) 194.

The guardian of a residuary legatee, being a trust company, given letters over other residuary legatees. *Matter of Lasak*, 30 N. Y. St. Repr. 356; aff'd, without opinion, 121 N. Y. 706, 31 N. Y. St. Repr. 996.

Guardian of an infant residuary legatee awarded letters of administration with will annexed over a daughter of testator being a legatee of an income for life of a portion of the residuary estate, and also over a legatee of a part of the residuary estate. *Matter of Lasak*, 30 N. Y. St. Repr. 356; aff'd, 31 N. Y. St. Repr. 996.

When granted.

Letters of administration with the will annexed cannot be granted upon a will probated in another State an exemplified copy of which is allowed to be filed and recorded here. *Baldwin v. Rice*, 100 App. Div. 241, 91 N. Y. Supp. 1086; aff'd, 183 N. Y. 55.

Where it appears that there are no assets and there is a presumption from great lapse of time (300 years) that there

are none, the issuance of letters is in the discretion of the surrogate. *Van Giessen v. Bridgford*, 83 N. Y. 348.

Where it is denied that there are unadministered assets or that petitioner is interested, the surrogate should take testimony and make his decision upon such issues, and if he finds against the petitioner upon either issue, he should not grant letters. *Matter of Bedford*, 130 App. Div. 642, 115 N. Y. Supp. 472.

Need not be granted to petitioner.

A petition asking the appointment of one person and that others having a prior right be cited affords jurisdiction to appoint some other person than the petitioner. *Matter of Lasak*, 30 N. Y. St. Repr. 356; aff'd, without opinion, 121 N. Y. 706, 31 N. Y. St. Repr. 996.

Granted to person having greatest interest.

The object of the statute in conferring a preference on the residuary legatees seems to be to place the administration in the hands of those whose interest is to see that the estate is administered honestly and without undue and careless waste. *Matter of Lasak*, 30 N. Y. St. Repr. 356; aff'd, 31 N. Y. St. Repr. 996, 121 N. Y. 706, no opinion.

Where two or more persons are comprised within a class to "one or more" of whom letters are to be issued, he should be appointed who, other things being equal, has the greatest interest under the will. *Quintard v. Morgan*, 4 Dem. 168, 8 Civ. Pro. 77.

A person not taking under the will but who desires to contest the validity of the will in Supreme Court, may be appointed administrator with the will annexed, there being no executor or other applicant willing to take letters. *Matter of Brown*, 60 Misc. Rep. 628, 113 N. Y. Supp. 937.

Residuary legatee.

A person is a residuary legatee who ultimately takes the estate after the termination of a life estate. *Matter of Browne*, 18 N. Y. St. Repr. 981, 3 N. Y. Supp. 279.

Contest between husband and residuary legatee—letters to residuary legatee. *Matter of Place*, 4 N. Y. St. Repr. 533; aff'd, 105 N. Y. 629, no opinion.

A CORPORATION RESIDUARY LEGATEE is entitled to letters under subdivision 2, of § 133. Where the legacy is to the treasurer of such corporation the legacy is to the corporation.

This section makes the following decisions no longer applicable. *Matter of Thompson*, 33 Barb. 334; aff'd, 28 Hun, 581; *Matter of Ciatts*, 105 App. Div. 143.

To executor or administrator of a sole legatee and devisee general or residuary.

Subdivision one of section 133 has been amended to give a right to letters not only to the representative of a sole legatee and devisee, but to the executor or administrator of a sole residuary legatee and devisee.

This preserves and extends the idea of granting letters to the person who is most interested in the management of the estate and in the proceeds to be derived from a proper and economical administration.

Males preferred to females.

Where the parties stand with equal right of priority, males may be preferred to females. *Matter of Wood*, 27 Abb. N. C. 329, 17 N. Y. Supp. 354; aff'd, 53 N. Y. St. Repr. 804.

Letters may be issued to beneficiary of trust estate.

Where testator's residuary estate is held in trust and occasion arises for the appointment of an administrator with the will annexed the beneficiary of a trust is entitled to letters in preference to his trustee. *Matter of Roux*, 5 Dem. 523; *Matter of Thompson*, 33 Barb. 334; aff'd, 28 How. Pr. 581.

A beneficiary of a portion of the estate held in trust was granted letters with the will annexed and the surrogate refused to set them aside on the ground, among others, that the beneficiary was not equally entitled with other residuary legatees. *Matter of Treadwell*, 37 Misc. Rep. 584, 75 N. Y. Supp. 1058.

One-half of the estate left in trust—the beneficiary applied for letters with the will annexed—*held* not a residuary legatee. *Matter of Ferguson*, 41 Misc. Rep. 465, 85 N. Y. Supp. 1102.

By the terms of the will the residuary estate was devised and bequeathed, one-eighth part to each of seven of his children, and the remaining one-eighth part to his executor, in trust to apply the income thereof to his son, the respondent, for his life, with remainder to his child or children, and, failing such child or children, to the descendants of the testator. Upon these facts the respondent, as beneficiary of the trust of one-eighth of the residue, had an equal right to administer with each of the other residuary legatees. *Matter of Roux*, 5 Dem. 523; *Matter of Thompson*, 33 Barb. 334; *aff'd*, 28 How. Pr. 581. No one of these persons was, in strictness, a residuary legatee, entitled to a preference in administration over the others, but they are remaindermen or general legatees and to be classed together. *Quintard v. Morgan*, 4 Dem. 168. In the discretion of the surrogate letters could lawfully be issued to any one of the persons entitled, without citing the others having only equal claims, and that was done in this case. *Matter of Wood*, 27 Abb. (N. C.) 329, 17 N. Y. Supp. 354; *Matter of Richardson*, 8 Misc. Rep. 140, 59 N. Y. St. Repr. 483, 29 N. Y. Supp. 1079; *Matter of Lasak*, 30 N. Y. St. Repr. 356, 8 N. Y. Supp. 740; *aff'd*, 121 N. Y. 706; *Matter of Treadwell*, 37 Misc. Rep. 584.

To assignee of whole estate.

The assignee of the whole estate appointed administrator with the will annexed, the next of kin consenting. *Matter of Clute*, 37 Misc. Rep. 710, 76 N. Y. Supp. 456.

Following expressed wish of testator.

Where legatees are rival claimants for letters a wish expressed by the deceased that one should be appointed may be given weight. *Matter of Powell*, 5 Dem. 281, 5 N. Y. St. Repr. 348.

Legatee before next of kin.

Even where a will does not dispose of the whole estate, a

legatee may have letters before the next of kin. *Matter of Blauvelt*, 72 Misc. Rep. 287, 131 N. Y. Supp. 111.

To trust company.

A trust company and certain banks are specially authorized to take the appointment as an administrator with the will annexed, and need not give a bond or take the prescribed oath. See ¶ 105.

How executor or administrator with the will annexed qualifies.

An executor from whom a bond is required as prescribed in this act, or an administrator with the will annexed, must, before letters are issued to him, qualify as prescribed by law with respect to an administrator upon the estate of an intestate; and the provisions of section 121 of this act, with respect to the bond to be given by the administrator of an intestate, apply to a bond given pursuant to this section; except that, in fixing the penalty thereof; the surrogate must take into consideration the value of the real property, or of the proceeds thereof, which may come to the hands of the executor or administrator, by virtue of any provision contained in the will, and also how much of the estate, if any, has already been administered.

§ 135, *Sur Ct. A.* Former § 2605, *Code Civ. Pro.*

In fixing the bond the surrogate may consider how much of the estate has already been administered upon.

Section 121, ¶ 86, permitting the surrogate to accept modified security upon consent of the next of kin and publication of notice, applies to the bond of an administrator with the will annexed. *Curtis v. Williams*, 3 Dem. 63.

This case was disapproved in *Matter of Le Roy* (5 N. Y. Supp. 555, 16 Civ. Pro. 343), but such right is now given by sections 121, 135.

A bond given upon appointment as administrator with the will annexed is binding upon the sureties even if it does not describe the administrator as being such "with the will annexed." *Casoni v. Jerome*, 58 N. Y. 315.

This section should be construed as requiring an administrator with the will annexed to give a bond for only such property as remains unadministered. *Sutton v. Weeks*, 5 Redf. 353.

¶ 92 Grant and Issue of Letters of Administration De Bonis Non.

Appointment of administrator de bonis non.

When all the administrators, to whom letters have been issued, die or become incapable, or the letters are revoked as to all of them, the surrogate must grant letters of administration *de bonis non* to one or more persons as their successors, in like manner as if the former letters had not been issued; and the proceedings to procure the grant of such letters are the same, and the same security shall be required, as upon original application; except that the surrogate may in his discretion, in case where the estate has been partially administered upon by the former representative or representatives, fix as the penalty of the bond to be given by such successor or successors, a sum not less than the value of the assets of the estate remaining unadministered.

§ 136, *Sur. Ct. A.* Former § 2606, *Code Civ. Pro.*

Formerly there was no section providing specifically for administration *de bonis non*, although such letters have been issued and recognized for many years.

When appointment not necessary.

After judicial settlement a person interested under the decree may enforce his rights against a bond without the appointment of an administrator de bonis non in place of one removed. *Prentiss v. Weatherly*, 68 Hun, 114, 52 N. Y. St. Repr. 80, 22 N. Y. Supp. 680; *aff'd*, 144 N. Y. 707.

Appointment not revived.

Where letters of administration have been revoked upon the probate of a will, and that probate has been set aside, there is no administrator and an original application for letters must be made. *Matter of Engelbrecht*, 15 App. Div. 541; *Belden v. Belden*, 118 App. Div. 296.

Administration de bonis non.

Administration *de bonis non* is granted in cases where the administrator dies or is removed before he has fully administered all the assets of the deceased. Such an administrator is appointed and qualified in the usual way, and continues the administration of the estate, taking it up where his predecessor left it.

The authority of an administrator *de bonis non* has been greatly extended in the United States beyond what was given him by the common law. *Dunne v. Am. Surety Co.*, 43 App. Div. 91, 59 N. Y. Supp. 429.

An administrator *de bonis non* may admit a valid claim and agree to pay it, notwithstanding the fact that the former representative had rejected the claim. *Matter of Hallenbeck*, 119 App. Div. 757; *aff'd* on this point, 195 N. Y. 143.

Who entitled. See ¶ 82.

Husband died leaving personal estate of less than \$3,000, and no descendants. Wife was appointed administratrix and died. Her sole next of kin and administrator was appointed administrator *de bonis non* over the sister of the husband. *Matter of Briasco*, 69 Misc. Rep. 278, 126 N. Y. Supp. 1001.

Bond.

Where the estate has been partially administered the surrogate is authorized to fix the penalty of the bond at a sum not less than the value of the assets of the estate remaining unadministered.

ADMINISTRATION DE BONIS NON WITH THE WILL ANNEXED is granted in like manner where all the administrators with the will annexed die or are removed before the estate is fully administered.

Rights of administrators de bonis non to appeal, prosecute and defend.

When administration of the effects of a deceased person, which shall have been left unadministered by any previous executor or administrator of the same estate, shall be granted to any person, such person may appeal from any judgment obtained against such previous executor or administrator of the same estate or against the original testator or intestate; and shall defend any appeal from any such judgment; and shall have the same remedies in the prosecution or defense of any action by or against such previous executors or administrators and for the collection and enforcing of any judgment obtained by them, as they have by law.

§ 115, *Decedent Estate Law*.

¶ 93 Affidavit of Estimated Value of Real and Personal Estate, Required Under the Transfer Tax Act.

Before letters testamentary or of administration can be granted the practice under the requirements of the Transfer Tax Act and the rules adopted by the various surrogates requires the filing of an affidavit showing the estimated value of the real estate in the State of New York left by the deceased and the amount of any mortgage thereon and the estimated value of the personal estate of the deceased.

The affidavit is also required to contain the names, post-office address, and the value of all legacies and devises passing under a will and the same information regarding all heirs and next of kin and their respective interests in the estate where the deceased died intestate.

Where this information is set forth in the petition, it is not necessary to file a separate affidavit. Many surrogates, in order to decrease as much as possible the number of papers to be filed in the office, prefer that this information be given in the petition, and draw their forms accordingly.

Assessment of transfer tax by appraiser and surrogate.

For a full and complete treatment of this special subject, see Gleason & Otis on Inheritance Taxation.

In the large counties there is a transfer tax appraiser appointed by the State Tax Commission with whom the matter of assessing the tax should be immediately taken up. In smaller counties the county treasurer assesses the tax.

Usually no move is made to assess the tax until the appraiser is asked to take it up. If the tax is paid within six months from the date of death, a discount of five per cent upon the amount of the tax is allowed, and therefore it is advisable in many estates to get the proceedings under way at least a month before the expiration of that time.

The appraiser usually provides blank affidavits to be used by the representative in the proceeding, which furnish a guide for giving the necessary information as to amount and value

of property, debts and persons interested. These affidavits are required to be executed in duplicate, and if there is a will, a copy to be annexed.

When the assessment is completed the appraiser files his proceedings and the order of the surrogate fixing the tax in the surrogate's office.

This order is usually made *pro forma* by the surrogate. If any person interested feels aggrieved thereby he may appeal to the surrogate who will then reconsider the order upon the merits. For proceedings on appeal, see ¶ 163.

Jurisdiction of the surrogate's court to make order assessing tax and determine necessary questions.

Jurisdiction of the surrogate.

The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under this article, or to appoint a trustee of such estate or any part thereof, or to give ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, and to do any act in relation thereto authorized by law to be done by a surrogate in other matters or proceedings coming within his jurisdiction; and if two or more surrogates' courts shall be entitled to exercise any such jurisdiction, the surrogate first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other surrogate. Every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the provisions of civil practice act or surrogate's court act shall set forth the tax commission as a party to be cited as therein prescribed, and a true and correct statement of all the decedent's property in this state and the value thereof; and upon the presentation thereof the surrogate shall issue a citation directed to the tax commission; and upon the return of the citation the surrogate shall determine the amount of the tax which may be or become due under the provisions of this article and his decree awarding the letters may contain any provision for the payment of such tax or the giving of security therefor which might be made by such surrogate if the tax commission were a creditor of the decedent. When it is made to appear to a surrogate of any county in this state that a safe deposit company, trust company, bank, person or corporation has in its possession or under its control papers of a decedent of whose estate such court has jurisdiction or that the decedent had leased from such a corporation a safe deposit box, and that such papers or such safe deposit box may contain a will of the decedent, or a deed to a burial plot in which the decedent is to be interred, he may make an order directing such safe deposit company, trust company, bank, person or corporation to permit a person

named in the order to examine such papers or safe deposit box in the presence of a representative of the tax commission and an officer of such safe deposit company, trust company, bank or corporation, or agent of such person, and if a paper purporting to be a will of the decedent, or the deed to a burial plot is found among such papers, or in such box, to deliver such will to the clerk of the surrogate's court of such county, or such deed to such person as may be designated in such order. The clerk of said court shall furnish a receipt upon the delivery to him of the will.

§ 228, *Tax Law*.

Obtaining possession of securities from a safe deposit box.

The representative of the Tax Commission in the county will appoint a convenient time to go to the bank or deposit company and open the box and make a list of the securities therein, and then the Tax Commission will give a waiver on the box, and thereafter the executor or administrator may visit the box at will, and make his official inventory of the contents.

Values upon stocks and bonds as of the date of death will be furnished by the Tax Commission for the purpose of including the same in the tax transfer affidavits.

Taxable transfers.

A tax shall be and is hereby imposed upon the transfer of any property real or personal, or of any interest therein or income therefrom in trust or otherwise, to persons or corporations in the following cases, subject to the exemptions and limitations hereinafter prescribed:

1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed thereof while a resident of the state.

2. When the transfer is by will or intestate law, of real property within this state, or of goods, wares and merchandise within this state, or of shares of stock of corporations organized under the laws of this state, or of national banking associations located in this state, and the decedent was a nonresident of the state at the time of his death; or of property evidenced by or consisting of shares of stock of a foreign corporation, joint stock company or association, or bonds, notes, mortgages or other evidences of interest in any corporation, joint stock company or association wherever incorporated or organized, except the shares of stock of a foreign corporation, joint stock company or association, or the bonds, notes, mortgages or other evidences of interest in any corporation, joint stock company or association, domestic or foreign, constituting, being or in the nature of a moneyed corporation, a railroad or transportation corporation, or a public service or manufacturing corporation as defined and classified by the laws of this state, and the property represented by such shares of stock, bonds, notes, mortgages or other evidences of interest, consists of real property which is

located wholly, or partly, within the state of New York, or of an interest in any partnership business conducted, wholly or partly, within the state of New York, and if not wholly within the state of New York, then in such proportion as the value of the real property of such corporation, joint stock company or association, or as the value of the entire property of such partnership located in the state of New York bears to the value of the entire property of such corporation, joint stock company or association or partnership, and the decedent was a nonresident of the state at the time of his death; or when the transfer is by will or intestate law of capital invested in business in the state by a nonresident of the state doing business in the state either as principal or partner.

3. Whenever the property of a resident decedent, or the property of a nonresident decedent within this state, transferred by will is not specifically bequeathed or devised, such property shall, for the purposes of this article, be deemed to be transferred proportionately to and divided pro rata among all the general legatees and devisees named in said decedent's will, including all transfers under a residuary clause of such will.

4. When the transfer is of property made by a resident, or is of real property within this state, or of goods, wares and merchandise within this state, or of shares of stock of corporations organized under the laws of this state or of national banking associations located in this state, made by a nonresident; or of property evidenced by or consisting of shares of stock of a foreign corporation, joint stock company or association, or bonds, notes, mortgages or other evidences of interest in any corporation, joint stock company, or association wherever incorporated or organized, except the shares of stock of a foreign corporation, joint stock company or association, or the bonds, notes, mortgages or other evidences of interest in any corporation, joint stock company or association, domestic or foreign, constituting, being or in the nature of a moneyed corporation, a railroad or transportation corporation, or a public service or manufacturing corporation as defined and classified by the laws of this state, and the property represented by such shares of stock, bonds, notes, mortgages or other evidences of interest consists of real property which is located, wholly or partly, within the state of New York, or of an interest in any partnership business conducted, wholly or partly, within the state of New York, and if not wholly within the state of New York, then in such proportion as the value of the real property of such corporation, joint stock company or association, or as the value of the entire property of such partnership located in the state of New York bears to the value of the entire property of such corporation, joint stock company or association or partnership made by a nonresident or capital invested in business in the state by a nonresident of the state doing business in the state either as principal or partner by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor, or donor or intended to take effect in possession or enjoyment at or after such death.

5. When any such person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer whether made before or after the passage of this chapter.

6. Whenever any person or corporation shall exercise a power of appointment

derived from any disposition of property, made either before or after the passage of this chapter, such appointment when made shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will.

7. Whenever property is held in the joint names of two or more persons, or as tenants by the entirety, or is deposited in banks or other institutions or depositories in the joint names of two or more persons and payable to either or the survivor upon the death of one of such persons the right of the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, to the immediate ownership or possession and enjoyment of such property, shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased tenant by the entirety, joint tenant or joint depositor and had been bequeathed to the surviving tenant by the entirety, joint tenant or joint tenants, person or persons, by such deceased tenant by the entirety, joint tenant or joint depositor by will.

8. The tax imposed hereby shall be upon the clear market value of such property at the rates hereinafter prescribed. § 220, *Tax Law*.

Exceptions and limitations.

Any property devised or bequeathed for religious ceremonies, observances or commemorative services of or for the deceased donor, or to any person who is a bishop or to any religious, educational, library, charitable, missionary, benevolent, hospital or infirmary corporation, wherever incorporated, including corporations organized exclusively for bible or tract purposes and corporations organized for the enforcement of laws relating to children or animals, or real property to a municipal corporation in trust for a specific public purpose, shall be exempted from and not subject to the provisions of this article. There shall also be exempted from and not subject to the provisions of this article personal property other than money or securities bequeathed to a corporation or association wherever incorporated or located, organized exclusively for the moral or mental improvement of men or women or for scientific, literary, patriotic, cemetery or historical purposes or for two or more of such purposes and used exclusively for carrying out one or more of such purposes. But no such corporation or association shall be entitled to such exemption if any officer, member or employee thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association or for any of its members or employees or if it be not in good faith organized or conducted exclusively for one or more of such purposes. There shall also be exempted from and not subject to the provisions of this article all property or any beneficial interest therein so transferred to any father, mother, husband, wife, widow or child of the decedent, grantor, donor or vendor if

the amount of the transfers to such father, mother, husband, wife, widow or child is the sum of five thousand dollars or less; but if the amount so transferred to any father, mother, husband, wife widow or child is over five thousand dollars, the excess above these amounts, respectively, shall be taxable at the rates set forth in the next section.

§ 221, *Tax Law*.

Proceedings by appraiser.

In each county in which the office of appraiser is not salaried the county treasurer shall act as appraiser. The surrogate, either upon his own motion, or upon the application of any interested person, including the tax commission, shall by order direct the person or one of the persons appointed pursuant to section two hundred and twenty-nine of this chapter in counties in which the office of appraiser is salaried, and in other counties, the county treasurer, to fix the fair market value of property of persons whose estates shall be subject to the payment of any tax imposed by this article.

Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the tax commission, and to such persons as the surrogate may by order direct, of the time and place when he will appraise such property. He shall at such time and place appraise the same at its fair market value as herein prescribed; and for that purpose the said appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall make report thereof and of such value in writing, to the said surrogate, together with the depositions of the witnesses examined, and such other facts in relation thereto and to said matter as the surrogate may order or require. Every appraiser, except in the counties in which the office of appraiser is salaried, for which provision is hereinbefore made, shall be paid his actual and necessary traveling expenses and the fees paid such witnesses, which fees shall be the same as those now paid to witnesses subpoenaed to attend in courts of record, payment to be made out of moneys appropriated for such purpose. No deduction shall be allowed from the appraised value of the property transferred on account of any liability of decedent incurred or assumed by the acquisition, care, improvement, use, enjoyment or disposition of property without the state, the transfer of which is not subject to tax under the provisions of this article. Any transfer of this property made by a decedent by deed, sale, or gift within two years prior to his death, without a valid and adequate consideration therefor, shall be presumed to have been made in contemplation of death within the meaning of this chapter.

The value of every future or limited estate, income, interest or annuity for any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum.

In estimating the value of any estate or interest in property, to the bene-

ficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated or diminished; provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgment, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided by section two hundred and twenty-five of this chapter.

Where any property shall, after the passage of this chapter, be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estate or interest is derived.

When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred, and the surrogate shall enter a temporary order determining the amount of said tax in accordance with this provision; provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article; and the executor or trustee of each estate, or the legal representative having charge of the trust fund, shall immediately upon the happening of said contingencies or conditions apply to the surrogate of the proper county, upon a verified petition setting forth all the facts, and giving at least ten days' notice by mail to all interested persons or corporations, for an order modifying the temporary taxing order of said surrogate so as to provide for the final assessment and determination of the tax in accordance with the ultimate transfer or devolution of said property. Such return of overpayment shall be made in the manner provided by section two hundred and twenty-five of this chapter.

Estates in expectancy which are contingent or defeasible and in which proceedings for the determination of the tax have not been taken or where the taxation thereof has been held in abeyance, shall be appraised at their full, undiminished value when the persons entitled thereto shall come into the beneficial enjoyment or possession thereof, without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation, upon which said estates in expectancy may have been limited.

Where an estate for life or for years can be divested by the act or omission of the legatee or devisee it shall be taxed as if there was no possibility of such divesting.

The report of the appraiser shall be made in duplicate, one of which duplicates shall be filed in the office of the surrogate and the other in the office of the tax commission.

§ 230, *Tax Law*.

Notice of assessment.

The appraiser gives notice of the hearing to all persons interested fixing the time and place of hearing.

Where one appraiser has given a notice to persons interested of the time and place of fixing a tax, and has even had a hearing, a successor appraiser can not proceed and make a report, but must institute the proceeding *de novo*. *In re Harte*, 179 App. Div. 39, 166 N. Y., Supp. 188, *aff'd*, 222 N. Y. 660.

Duties and powers of appraiser.

The kind of evidence which he may accept and its weight is in the discretion of the appraiser. Surrogate Fowler has said: "There seems to be given to the transfer tax appraiser considerable latitude, by the language of the statute providing for the creation of his office, concerning the evidence he shall accept as to values. In fact, the use of the official title of 'appraiser' carries with it a significance that this officer, in so far as his work shown in his report is concerned, is to be the judge of the nature of the evidence he desires submitted to him on the question of valuation. Of course this is true only *sub modo*, and in cases fairly treated by him." *In re Gilbert*, 160 N. Y. Supp. 213.

Corporations and persons considered as to exemption under the transfer tax.

American Baptist Missionary Union (Boston). *Matter of Lyon*, 144 App. Div. 104, 128 N. Y. Supp. 1004.

Brooklyn Society for Prevention of Cruelty to Children, par-

tially exempt. *Matter of Moses*, 138 App. Div. 525, 123 N. Y. Supp. 443.

But under an amendment such society is now exempt.

A bequest to a foreign cemetery association of \$1,000 was held not to be exempt from taxation. *Matter of Fay*, 62 Misc. Rep. 154, 116 N. Y. Supp. 423.

Cooper Union (N. Y.) *Matter of Kucielski*, 144 App. Div. 100, 128 N. Y. Supp. 768.

Craig Colony for Epileptics. *Matter of Moore*, 66 Misc. Rep. 116, 122 N. Y. Supp. 828; aff'd, 143 App. Div. 973, 128 N. Y. Supp. 1135.

Mohawk and Hudson River Humane Society.

Woman's Christian Temperance Union of Ballston.

Western New York Home, etc. *Matter of Higgins*, 55 Misc. Rep. 175, 106 N. Y. Supp. 465.

Young Men's Christian Association. *Matter of Moses*, 138 App. Div. 525, 123 N. Y. Supp. 443.

Young Women's Christian Association. *Matter of Moses*, 138 App. Div. 525.

A corporation included in the second class mentioned in the section is precluded from being classed under the first. *Matter of Francis*, 121 App. Div. 129; aff'd, 189 N. Y. 554.

The test to be applied is the act of incorporation, not the certificate. *Matter of White*, 118 App. Div. 869, 103 N. Y. Supp. 688.

If exemption is claimed as being a religious corporation it must have been incorporated under the Religious Corporation Law.

American Society for the Prevention of Cruelty to Animals not exempt under § 221 of the Transfer Tax Law, as amended by chapter 600 of the Laws of 1910. *Matter of Daly*, 163 App. Div. 949, 148 N. Y. Supp. 1111; aff'd, 215 N. Y. 620.

Joint survivorship accounts.

Where there is no evidence as to whom the fund belonged, a joint account payable to survivor created after chap. 664, L. 1915, took effect, is taxable at full face value.

Where it was created before that act, half of the joint account is taxable. *Matter of Dolbeer*, 226 N. Y. 622, rev'ing 173 N. Y. Supp. 905; *In re McKelway*, 221 N. Y. 15; *Matter of Kelley*, 188 N. Y. Supp. 191.

Deposits in trust for another.

A deposit in trust for another is revocable and title does not pass until death of the depositor, and therefore the deposit is taxable. *In re Bender*, 182 N. Y. Supp. 217.

Tenancy by the entirety.

Where title has been taken since the amendment to the Tax Law, chap. 323, L. 1916, the whole value of an estate by entirety may be taxed upon the death of one owner, under the same principal that a joint bank account may be so taxed. *In re Chase*, 183 N. Y. Supp. 638; *Matter of Dolbeer*, 226 N. Y. 623; *In re Greims*, 183 N. Y. Supp. 149.

Good will of corporation.

Rules for ascertaining value of the good will of a corporation, or of the value of shares of stock including the good will. *In re Crerands*, 154 N. Y. Supp. 938; *In re Roos*, 90 Misc. Rep. 521, 154 N. Y. Supp. 939.

Passing under power of appointment.

Estate in trust passing under power of appointment or under will probated before the enactment of a transfer tax law is not subject to transfer tax. *Matter of Slosson*, 216 N. Y. 79.

Exemption where transfer was made in contemplation of death.

Prior to the taking effect of chap. 664, L. of 1915, amending the tax law, a transfer in contemplation of death was a separate transfer from that made by will and the exemption allowed could be claimed on such transfer and also on the transfer by will. *Matter of Hodges*, 215 N. Y. 447.

As to transfers after the amendment, see *Matter of Messrole*, 98 Misc. Rep. 105, 162 N. Y. Supp. 414; *In re Garcia*, 101 Misc. Rep. 387, 167 N. Y. Supp. 168.

U. S. estate tax not deducted.

The U. S. estate tax should not be deducted in assessing the transfer tax under the State law. *In re Bierstadt*, 99 Misc. Rep. 457, 163 N. Y. Supp. 1104; aff'd, 178 App. Div. 836, 166 N. Y. Supp. 168; *In re Sherman*, 179 App. Div. 497, 166 N. Y. Supp. 19; aff'd, 222 N. Y. 540.

Repeal of the tax on investments.

On May 10 chapters 644 and 646 of the Laws of 1920 became effective repealing the tax on investments. Chapter 644 specifically repeals section 221-b of the Tax Law included in article ten—taxable transfers, which provided for the additional tax of 5 per centum of the appraised inventory value of investments held in the estate of a decedent, unless the investment tax had been paid for a period including date of death.

The repeal of this section also applies to the estate of every decedent who died subsequently to July 31, 1919, such date being that fixed by the Income Tax Law (section 352), subsequent to which intangible personal property shall no longer be subject to local taxation. It further provides that if pursuant to section 221-b an assessment has been made on property constituting a part of the estate of a decedent who shall have died subsequent to July 31, 1919, such assessment shall be canceled and any tax paid on account thereof shall be refunded in the manner provided by article ten of the Tax Law.

Determination of surrogate.

From such report of appraisal and other proof relating to any such estate before the surrogate, the surrogate shall forthwith, as of course, determine the cash value of all estates and the amount of tax to which the same are liable; or the surrogate may so determine the cash value of all such estates and the amount of tax to which the same are liable, without appointing an appraiser.

The superintendent of insurance shall, on the application of any surrogate, or appraiser, determine the value of any such future or contingent estates, income or interest therein limited for the life or lives of persons in being, upon the facts contained in any such appraiser's report, and certify the same to the surrogate or appraiser, and his certificate shall be conclusive evidence that the method of computation adopted therein is correct.

The surrogate shall immediately give notice, upon the determination by him

as to the value of any estate which is taxable under this article, and of the tax to which it is liable, to all persons known to be interested therein, and shall immediately forward a copy of such taxing order to the tax commission. The surrogate shall also forward to the tax commission copies of all orders entered by him in relation to or affecting in any way the transfer tax on any estate, including orders of exemption.

If, however, it appears at any stage of the proceedings that any of such persons known to be interested in the estate is an infant or an incompetent, the surrogate may, if the interest of such infant or incompetent is presently involved and is adverse to that of any of the other persons interested therein, appoint a special guardian of such infant; but nothing in this provision shall affect the right of an infant over fourteen years of age or of any one on behalf of an infant under fourteen years of age to nominate and apply for the appointment of a special guardian for such infant at any stage of the proceedings.

§ 231, *Tax Law*.

Rates of tax.

1. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five thousand dollars, to any father, mother, husband, wife, or child of the decedent, grantor, bargain or donor or vendor, or to any child adopted as such in conformity with the laws of this state, of the decedent, grantor, bargainor, donor or vendor, or upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars to any lineal descendant of the decedent, grantor, or bargainor, donor or vendor, born in lawful wedlock, the tax on such transfers shall be at the rate of

One per centum on any amount up to and including the sum of twenty-five thousand dollars;

Two per centum on the next seventy-five thousand dollars or any part thereof;

Three per centum on the next one hundred thousand dollars or any part thereof;

Four per centum on the amount representing the balance of each individual transfer.

2. Upon all transfers taxable under this article of property or any beneficial interest therein in excess of the value of five hundred dollars, to a brother, sister, wife or widow of a son, or the husband of a daughter of the decedent, grantor, bargainor, donor or vendor, or to any child to whom any such decedent, grantor, bargainor, donor or vendor for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent, provided, however, such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, the tax on such transfers shall be at the rate of

Two per centum on any amount up to and including the sum of twenty-five thousand dollars;

Three per centum on the next seventy-five thousand dollars or any part thereof;

Four per centum on the next one hundred thousand dollars or any part thereof;

Five per centum on the amount representing the balance of each individual transfer.

3. Upon all transfers taxable under this article of property or any beneficial interest therein of an amount in excess of the value of five hundred dollars, to any person or corporation other than those enumerated in paragraphs one and two of this section the tax on such transfers shall be at the rate of

Five per centum on any amount up to and including the sum of twenty-five thousand dollars;

Six per centum on the next seventy-five thousand dollars or any part thereof;

Seven per centum on the next one hundred thousand dollars or any part thereof;

Eight per centum on the amount representing the balance of each individual transfer.

§ 221-a, *Tax Law*.

Exemptions and rates under some previous statutes.

Act of June 23, 1910, chap. 600, L. 1910.

Exemption to near relatives including brother and sister \$10,000. More than \$10,000 one per centum.

Act of July 11, 1910, chap. 706, L. 1910.

Exemption to near relatives including brother and sister \$500, but if the estate passing was of more value than \$500, no exemption was allowed. Rate one per centum. Exemption of \$5,000 allowed to father, mother, widow or minor child. First rate one per centum.

Act in effect July 21, 1911.

Exemption of \$5,000 to near relatives including brother and sister. First rate one per centum in excess of \$500. Exemption of \$1,000 to most others. First rate five per centum in excess of \$1,000.

Act in effect May 20, 1915.

Exemption of \$5,000 to near relatives including brother and sister; \$1,000 exempt to all others. First rate one per centum to near relatives; five per centum to others.

In effect May 15, 1916.

Exemption of \$5,000 to near relatives not including brothers

and sisters, etc. First rate one per centum on excess; \$500 exempt to brothers and sisters. First rate two per centum; \$500 exemption to others. First rate five per centum.

Accrual and payment of tax.

All taxes imposed by this article shall be due and payable at the time of the transfer, except as herein otherwise provided. Taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof can not be ascertained at the time of the transfer as herein provided, shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof. Such tax shall be paid to the tax commission in a county in which the office of appraiser is salaried, and in other counties, to the county treasurer, and said tax commission or county treasurer shall furnish, and every executor, administrator or trustee shall take, duplicate receipts of such payment as provided in section two hundred and thirty-six. § 222. *Tax Law.*

Discount and interest.

If such tax is paid within six months from the accrual thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accrual thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax cannot be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged; provided, however, that whenever the payment of any tax imposed by this article and payable to a county treasurer has been heretofore or shall be hereafter tendered, through inadvertence, to the tax commission within the period of time before interest attaches to said tax, if such tax is paid in full to the treasurer of the proper county within ten days thereafter, the county treasurer, when directed so to do by the tax commission, may receipt in full for such tax without collecting any interest imposed thereon by this section of the tax law. § 223, *Tax Law.*

Lien of tax and collection by executors, administrators and trustees.

Every such tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred, and the executors, administrators and trustees of every estate so transferred shall be personally liable for such tax until its payment. Every executor, administrator or trustee shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such executor, administrator or trustee having in charge or in trust any legacy or property

for distribution subject to such tax shall deduct the tax therefrom and shall pay over the same to the tax commission or county treasurer, as herein provided. If such legacy or property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific legacy or property subject to tax under this article to any person until he shall have collected the tax thereon. If any such legacy shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the executor, administrator or trustee, and the tax shall remain a lien or charge on such real property until paid; and the payment thereof shall be enforced by the executor, administrator or trustee in the same manner that payment of the legacy might be enforced, or by the district attorney under section two hundred and thirty-five of this chapter. If any such legacy shall be given in money to any such person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the court having jurisdiction of an accounting by him, to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require.

§ 224, *Tax Law*.

Refund of tax erroneously paid.

If any debts shall be proven against the estate of a decedent after the payment of any legacy or distributive share thereof, from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share, and such person is required by order of the surrogate having jurisdiction, on notice to the tax commission, to refund the amount of such debts or any part thereof, an equitable proportion of the tax shall be repaid to him by the executor, administrator or trustee, if the tax has not been paid; or if such tax has been paid, the tax commission with the approval of the comptroller shall refund out of the funds in the custody of the comptroller to the credit of such taxes such equitable proportion of the tax. If after the payment of any tax in pursuance of an order fixing such tax, made by the surrogate having jurisdiction, such order be modified or reversed by the surrogate having jurisdiction within two years from and after the date of entry of the order fixing the tax, or be modified or reversed at any time on an appeal taken therefrom within the time allowed by law on due notice to the tax commission, the tax commission with the approval of the comptroller shall refund to the executor, administrator, trustee, person or persons by whom such tax was paid, the amount of any moneys paid or deposited on account of such tax in excess of the amount of the tax fixed by the order modified or reversed, out of the funds in the custody of the comptroller to the credit of such taxes; but no application for such refund shall be made after one year from such reversal or modification, unless an appeal shall be taken therefrom, in which case no such application shall be made after one year from the final determination on such appeal or of an appeal taken therefrom, and the representatives of the estate, legatees, devisees or distributees entitled to any refund under this section shall not be entitled to any interest upon such refund, and the state comptroller shall deduct

from the fees allowed by this article to the county treasurer the amount theretofore allowed him upon such overpayment. Where it shall be proved to the satisfaction of the surrogate that deductions for debts were allowed upon the appraisal, since proved to have been erroneously allowed, it shall be lawful for such surrogate to enter an order assessing the tax upon the amount wrongfully or erroneously deducted.

§ 225. *Tax Law.*

Receipts for taxes.

One of the duplicate receipts issued for the payment to the tax commission of any tax under this article, as provided by section two hundred and twenty-two, shall be signed by the state treasurer and countersigned by the state comptroller, and by the tax commission if issued by any county treasurer. The officer so countersigning the same shall charge the officer receiving the tax with the amount thereof and affix the seal of his office to the same and return to the proper person.

No executor, administrator or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of this article unless he shall produce a final receipt so sealed and countersigned, or a certified copy thereof. Any person shall, upon the payment of fifty cents to the officer issuing such receipt, be entitled to a duplicate thereof, to be signed, sealed and countersigned in the same manner as the original.

Any person shall, upon the payment of fifty cents, be entitled to a certificate of the tax commission that the tax upon the transfer of any real estate of which any decedent died seized has been paid, such certificate to designate the real property upon which such tax is paid, the name of the person so paying the same, and whether in full of such tax. Such certificate may be recorded in the office of the county clerk or register of the county where such real property is situate, in a book to be kept by him for that purpose, which shall be labeled "transfer tax."

§ 236, *Tax Law.*

Payment and receipt.

When the order fixing the tax is received from the transfer tax appraiser or county treasurer, a check should be drawn payable to the order of the Tax Commission or County Treasurer, and sent with a statement of the name of the deceased, the county of his late residence and the date of the order, and the duplicate receipts will be returned. If the tax is paid within six months from the date of death 5% may be deducted from the face of the tax, if within 18 months and after 6 months nothing is deducted, and if after 18 months a penalty of 10% from date of death should be added.

Appeal and other proceedings.

The tax commission or any person dissatisfied with the appraisalment or assessment and determination of tax may appeal therefrom to the surrogate within

sixty days from the fixing, assessing and determination of tax by the surrogate as herein provided, upon filing in the office of the surrogate a written notice of appeal, which shall state the grounds upon which the appeal is taken; but no costs shall be allowed by the surrogate on such appeal.

Within two years after the entry of an order or decree of a surrogate determining the value of an estate and assessing the tax thereon, the tax commission may, if it believes that such appraisal, assessment or determination has been fraudulently, collusively or erroneously made, make application to a justice of the supreme court of the judicial district embracing the surrogate's court in which the order or decree has been filed, for a reappraisal thereof. The justice to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers and be subject to the duties of an appraiser under section two hundred and thirty and shall receive compensation at the rate of five dollars per day for every day actually and necessarily employed in such appraisal. Such compensation shall be payable by the tax commission out of moneys appropriated for such purpose, upon the certificate of the justice appointing him. The report of such appraiser shall be filed with the justice by whom he was appointed, and thereafter the same proceedings shall be taken and had by and before such justice as are herein provided to be taken and had by and before the surrogate. The determination and assessment of such justice shall supersede the determination and assessment of the surrogate, and shall be filed by such justice in the office of the tax commission, and a certified copy thereof transmitted to the surrogate's court of the proper county.

§ 232, *Tax Law*.

For proceedings on taking appeal, see ¶ 163.

Federal income tax law in-respect to estates and trusts.

This law affects executors, administrators, trustees and guardians and requires that returns be filed and taxes paid as specified in the act. The whole act should be consulted and the regulations of the Treasury Department obtained for reference from the collector of internal revenue for the local district.

ESTATES AND TRUSTS

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

(2) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

(3) Income held for future distribution under the terms of the will or trust; and

(4) Income which is to be distributed to the beneficiaries periodically, whether

or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

(b) The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that there shall also be allowed as a deduction (in lieu of the deduction authorized by paragraph (11) of subdivision (a) of section 214) any part of the gross income which, pursuant to the terms of the will or deed creating the trust, is during the taxable year paid to or permanently set aside for the United States, any state, territory, or any political subdivision thereof, or the District of Columbia, or any corporation organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual; and in cases under paragraph (4) of subdivision (a) of this section the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

(c) In cases under paragraph (1), (2), or (3) of subdivision (a) the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases the estate or trust, shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the beneficiary shall, for the purpose of the normal tax, be allowed as credits in addition to the credits allowed to him under section 216, his proportionate share of such amounts specified in subdivisions (a) and (b) of section 216 as are received by the estate or trust.

Extracts from Regulations No. 45.

Estates and trusts taxed to fiduciary.

Art. 342. In the case of (a) estates of decedents before final

settlement and of (b) trusts, whether created by will or deed, for accumulation of income, whether for unascertained persons or persons with contingent interests or otherwise, the income is taxed to the fiduciary as to any single individual, except that from the income of a decedent's estate there may first be deducted any amount of income properly paid or credited to a beneficiary. See section 200 of the statute and articles 1521 and 1522. Where under the terms of the will or deed the trustee may in his discretion distribute the income or accumulate it, the income is taxed to the trustee, irrespective of the exercise of his discretion. The imposition of the tax is not affected by the fact that an ultimate beneficiary may be a person exempt from tax. A statutory allowance paid a widow out of the corpus of the estate is not deductible from gross income. As an intestate's real estate does not pass to his administrator, upon a sale by the heirs, whether before or after settlement of the estate, each heir is taxed individually on any profit derived.

Decedent's estate during administration.

Art. 343. The "period of administration or settlement of the estate" is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payment of debts and legacies. It is the time actually required for this purpose, whether longer or shorter than the period specified in the local statute for the settlement of estates. Where an executor, who is also named as trustee, fails to obtain his discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not. No taxable income is realized from the passage of property to the executor or administrator on the death of the decedent, even though it may have appreciated in value since the decedent acquired it. In the event of delivery of property in kind to a legatee or distributee, no income is realized. Where, however, the executor sells property of the estate

for more than its value at the death of the decedent, the excess is income taxable to the estate. See article 1562.

Incidence of tax on estate or trust.

Art. 344. Liability for payment of the tax attaches to the person of an executor or administrator up to and after his discharge, where prior to distribution and discharge he had notice of his tax obligations or failed to exercise due diligence in determining whether or not such obligations existed. Liability for the tax also follows the estate itself, and when by reason of the distribution of the estate and the discharge of the executor or administrator it appears that collection of the tax can not be made from the executor or administrator, the legatees or distributees must account for their proportionate share of the tax due and unpaid. The same considerations apply to other trusts. Where the tax has been paid on the net income of an estate or trust by the fiduciary, such income is free from tax when distributed to the beneficiaries.

Exemption of \$1000 allowed.

Credits to trust or beneficiary.

Art. 346. (a) In the case of an estate or trust taxed to the fiduciary it is allowed the same credits against net income as a single person, including a personal exemption of \$1,000, but no credit for dependents. (b) In the case of an estate or trust taxed to the beneficiaries each beneficiary is allowed for the purpose of the normal tax, in addition to his individual credits, his proportionate share of such dividends from domestic and resident foreign corporations and of such interest not entirely exempt from tax upon obligations of the United States and bonds of the war finance corporation as are received by the estate or trust. Each beneficiary is entitled to but one personal exemption, no matter from how many trusts he may receive income. See section 216 of the statute and articles 301-307.

FIDUCIARY RETURNS

SEC. 225. That every fiduciary (except receivers appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for the individual, estate or trust for which he acts (1) if the net income of such individual is \$1,000 or over if single or if married and not living with husband or wife, or \$2,000 or over if married and living with husband or wife, or (2) if the net income of such estate or trust is \$1,000 or over or if any beneficiary of such estate or trust is a nonresident alien, stating specifically the items of the gross income and the deductions and credits allowed by this title. Under such regulations as the Commissioner with the approval of the secretary may prescribe, a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of such individual, estate or trust to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this act shall be subject to all the provisions of this act which apply to individuals.

Fiduciary returns.

Art. 421. Every fiduciary, or at least one of joint fiduciaries, must make a return of income (a) for the individual whose income is in his charge, if the net income of such individual is \$2,000 or over if married and living with husband or wife or is \$1,000 or over in other cases, or (b) for the estate or trust for which he acts, if the net income of such estate or trust is \$1,000 or over or if any beneficiary of such estate or trust is a non-resident alien. The return in case (a) and also in case (b) if the tax is payable by the fiduciary shall be on form 1040 (revised), except that it may be on short form 1040 A (revised) where the net income does not exceed \$5,000. The return shall be on form 1041 (revised) in case (b) if the tax is payable by the beneficiaries. In such a case the fiduciary shall include in the return a statement of each beneficiary's distributive share of the net income, whether or not distributed before the close of the taxable year for which the return is made. See section 219 of the statute and articles 341-347. If the net income of a decedent from the beginning of the taxable year to the date of his death was \$1,000 or more, if unmarried, or \$2,000 or more,

if married, the executor or administrator shall make a return for such decedent. See article 305.

Return by guardian or committee.

Art. 422. A fiduciary acting as the guardian of a minor having a net income of \$1,000 or more or \$2,000 or more, according to the marital status of such person, must make a return for such minor on form 1040 (revised) or 1040 A (revised) and pay the tax, unless such minor himself makes a return or causes it to be made. A fiduciary acting as the committee of an insane person having an income of \$1,000 or more or \$2,000 or more, according to the marital status of such person, must make a return for such incompetent on form 1040 (revised) or 1040 A (revised) and pay the tax.

Federal estate tax law.

Consult the revenue act of 1918, approved February 24, 1919, and Regulations No. 37, U. S. Internal Revenue.

Description of taxable estates.

Art. 4. The tax is imposed in the case of the estate of "every decedent," although, by reason of an exemption, the net estate of a resident decedent, in order to be taxable, must exceed \$50,000. (See sec. 403 (a) 4.) The estate of a nonresident decedent, however, is taxable if any part of it is situated in the United States. The statute takes no account of the citizenship of the decedent, but prescribes different rules according to whether the decedent was a "resident" or a "nonresident" of the United States. A person residing in Italy is a "nonresident," for the purpose of the tax, although a citizen of the United States; a person residing in the United States is a "resident," although a citizen of Italy. A "resident" is one who at the time of his death resided in the States, the Territories of Alaska or Hawaii, or the District of Columbia. All other persons are "nonresidents." Persons residing in Porto Rico or the Philippine Islands are "nonresidents."

Definition of "resident."

Art. 5. A person is a "resident" of the United States, for the purpose of this tax, only in case he had a *domicile* therein at the time of his death. A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefrom. Residence without the requisite intention to remain will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal. A decedent who died while abroad will be presumed to be a nonresident, and the burden of proving the contrary rests upon the executor.

Determination of tax liability.**Manner of determining liability.**

Art. 6. The first step in the determination of tax liability is to ascertain the value of the decedent's gross estate in the manner prescribed by law. (See Arts. 12 to 36.) The second step is to deduct from this value certain amounts specified by law in order to arrive at the value of the net estate. (See Arts. 37 to 64.) The third step is to obtain the sum of certain percentages of the value of successive portions of the net estate, as provided by the applicable taxing act. (See Arts. 7, 8.)

ESTATE TAX

[Except as otherwise specified, the section references are to the Revenue Act of 1918.]

SEC. 400. That when used in this title—

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue of such district as may be designated by the Commissioner.

SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon

the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

- 1 per centum of the amount of the net estate not in excess of \$50,000;
- 2 per centum of the amount by which the net estate exceeds \$50,000 and does not exceed \$150,000;
- 3 per centum of the amount by which the net estate exceeds \$150,000 and does not exceed \$250,000;
- 4 per centum of the amount by which the net estate exceeds \$250,000 and does not exceed \$450,000;
- 6 per centum of the amount by which the net estate exceeds \$450,000 and does not exceed \$750,000;
- 8 per centum of the amount by which the net estate exceeds \$750,000 and does not exceed \$1,000,000;
- 10 per centum of the amount by which the net estate exceeds \$1,000,000 and does not exceed \$1,500,000;
- 12 per centum of the amount by which the net estate exceeds \$1,500,000 and does not exceed \$2,000,000;
- 14 per centum of the amount by which the net estate exceeds \$2,000,000 and does not exceed \$3,000,000;
- 16 per centum of the amount by which the net estate exceeds \$3,000,000 and does not exceed \$4,000,000;
- 18 per centum of the amount by which the net estate exceeds \$4,000,000 and does not exceed \$5,000,000;
- 20 per centum of the amount by which the net estate exceeds \$5,000,000 and does not exceed \$8,000,000;
- 22 per centum of the amount by which the net estate exceeds \$8,000,000 and does not exceed \$10,000,000; and
- 25 per centum of the amount by which the net estate exceeds \$10,000,000.

The taxes imposed by this title or by Title II of the Revenue Act of 1916 (as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917) or by Title IX of the Revenue Act of 1917, shall not apply to the transfer of the net estate of any decedent who has died or may die while serving in the military or naval forces of the United States in the present war or from injuries received or disease contracted while in such service, and any such tax collected upon such transfer shall be refunded to the executor.

DEDUCTIONS

SEC. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the

settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any state, succession, legacy or inheritances taxes;

Deductions in the case of resident estates.

Art. 37. In the case of the estates of residents, the deductions are made from the value of the entire gross estate, wherever situated. The deductions specified in the above provisions, contained in the Revenue Act of 1918, are proper in all cases where the decedent died on or after February 25, 1919. Where the decedent died prior to February 25, 1919, the case is governed by the provisions of the Revenue Act of 1916, which permits the following deductions:

- (1) Funeral expenses.
- (2) Administration expenses.
- (3) Claims against the estate.
- (4) Unpaid mortgages.
- (5) Losses from casualty or theft.
- (6) Support of decedent's dependents.
- (7) Other charges against the estate.
- (8) Specific exemption of \$50,000.
- (9) In the case of decedents dying after December 31, 1917, public, religious, charitable, scientific, literary, and educational bequests.

The provision in the Revenue Act of 1916 for the deduction of "such other charges" than those previously specified as may be allowed by the laws of the jurisdiction is omitted in the Revenue Act of 1918. Consequently, in the case of estates of all persons dying after February 24, 1919, the executor, in order to obtain a deduction, must bring the item within one of the classes specifically described.

The law has been held to be constitutional; that as the tax was upon the transfer it should be paid from the residuary estate, and not by legatees. *Matter of Hamlin*, 226 N. Y. 407; *Matter of Douglas*, 171 N. Y. Supp. 956; *Matter of Sherman*, 179 App. Div. 497, 166 N. Y. Supp. 19.

CHAPTER XXIV.

Classification of Guardians, and Jurisdiction to Make or Approve an Appointment. Appointment and Qualification of General Guardians of the Person and of the Property, or Both.

- ¶ 94. Guardians classified.
Rules on appointment by supreme court.
- § 172. Guardian by judicial appointment and approval.
- § 185. Notice to be filed in surrogate's court.
- ¶ 95. § 173. Power of surrogate's court to appoint.
- § 174. Jurisdiction to appoint.
- ¶ 96. § 175. Petition for appointment.
- § 176. Contents of petition.
Guardianship of person of married woman.
- § 177. Citation.
- § 178. Hearing.
- ¶ 97. § 179. Decree; term of office.
- ¶ 98. § 180. How guardian qualifies.
- § 182. Bond of guardian of person.
- § 181. Limited letters.

¶ 94 Guardians Classified and Defined; Concurrent Jurisdiction of Supreme and Surrogate's Court.

Guardians classified.

There are four classes of guardianships each separate from the other and each governed in part by its own peculiar rules and regulations:

a. Guardian in socage which concerns the real estate of the infant only, and belongs, without appointment, to the persons mentioned in section 80 of the Domestic Relations Law.

b. Guardian by deed obtains his authority to act as a general guardian of the infant's person and property by the recording of the deed in the proper county clerk's office within three months after the death of the grantor.

No letters of guardianship are issued but such guardian is subject to the control of the surrogate of the county in which the deed is recorded.

c. Guardian by will obtains his authority from the will which must be duly proved in the proper surrogates office and letters thereon are duly issued. Such a guardian has the custody and control of the person and estate of the infant and is subject to the control of the surrogate.

d. Guardian by judicial appointment secures his authority from the court and is at all times subject to its direction and control.

Limited authority of natural guardian.

Although by section 81 of the Domestic Relations Law the parents of an infant are designated as his natural guardians, such designation does not confer the authority of a guardian by judicial appointment. The sections of the Domestic Relations Law mentioned were not meant to effect a change in the previous law upon the subject to which they relate, but were intended to be and are in substance a re-enactment of section 1, title 3, chapter 8, part 2 of the Revised Statutes, as amended by chapter 175 of the Laws of 1893 and of the provisions of sections 2, 3 and 20 of said title 3 of the Revised Statutes. See notes to sections 51, 52 and 53, Report Commissioners of Statutory Revision, 1896, 644, 645.

Guardian by judicial appointment and approval.

A general guardian is one appointed by the supreme, or surrogate's court, for an infant, either over or under fourteen years of age.

A guardian by will is one appointed by the will of a father or mother in accordance with the provision of the domestic relations law, who has qualified pursuant to the provisions of this article.

A guardian by deed is one appointed by the deed of a father or mother in accordance with the provision of the domestic relations law, who has duly qualified pursuant to the provisions of this article.

The term "guardian" as used in this act applies to all such guardians, except ancillary guardians. § 172, *Sur. Ct. A.* Former § 2642, *Code Civ. Pro.*

Guardian by judicial appointment; concurrent jurisdiction of supreme court to appoint general guardians.

Neither rule 290 of the Rules of Civil Practice nor section 174 has in any way limited the jurisdiction of the Supreme

Court over the person and estate of infants, and this without regard to age, consequently the Supreme Court may appoint a general guardian of an infant's person and estate, even though the infant being over fourteen years will not consent to such appointment. *Matter of White*, 40 App. Div. 165, 57 N. Y. Supp. 862; aff'd, 160 N. Y. 685.

The Supreme and Surrogates' Courts have concurrent jurisdiction in many respects. The guardianship of the person does not always, under all conditions, give absolute right to the custody of the person. The Supreme Court, as the guardian of all infants has inherent power, in a proper case, to take the custody of a child, even from a general guardian.

Where the Supreme Court has made a prior award of the custody of a child, an after-appointed guardian should apply to the Supreme Court for a direction as to future custody. *Matter of Lee*, 220 N. Y. 532; rev'g, 176 App. Div. 141, 161 N. Y. Supp. 1100.

The power formerly possessed in this State by the chancellor is now vested in the Supreme Court, which exercises through its judges the same jurisdiction over infants in awarding the custody and care of their persons and property as was possessed and exercised by that officer. *Matter of Hubbard*, 82 N. Y. 90; *Brown v. Snell*, 57 id. 286; *Strubbe v. Kings Co. Trust Co.*, 60 App. Div. 548, 69 N. Y. Supp. 1092; aff'd, 169 N. Y. 603.

Supreme court rules regarding appointment of guardian by the supreme court.

Appointment of general guardian.

Except in cases otherwise provided for by law, for the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upward, or some relative or friend, if the infant be under fourteen, may present a petition to the court, stating the age and residence of the infant, and the names and residence of the living parents, if any, or of the person proposed or nominated as guardian, and the relationship, if any, which said person bears to the infant, and the nature, situation and value of the infant's estate.

Rule 290, Civ. Proc.

Age of infant and amount of property to be ascertained by court.

On presenting the petition, the court, by inspection or otherwise, shall ascer-

tain the age of the infant, and if of the age of fourteen years or upward, shall examine him as to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, shall select and name a competent and proper person as guardian. The court shall also ascertain the amount of the personal property, and the gross amount or value of the rents and profits of the real estate of the infant during his minority, and the sufficiency of the security offered by the guardian.

Rule 291, Civ. Proc.

Bond of a general guardian appointed by the supreme court. See rule 292.

Notice required to be given to the proper surrogate's court of the appointment of a general guardian by the supreme court.

Confusion has often arisen where the Supreme Court has exercised its jurisdiction to appoint guardians, because no notice that such a guardian had been appointed was given to the Surrogate's Court having concurrent jurisdiction. In the absence of such notice, the surrogate might be led to appoint another guardian, or might certify that no guardian for a certain infant had been appointed. To obviate this condition § 183 has been enacted.

Appointment of general guardian by supreme court. Notice to surrogate's court.

Where the supreme court, or any court other than the surrogate's court, appoints a general guardian of an infant's person, or property, or both, a certified copy of the order or decree appointing such guardian and of the bond or undertaking given by such guardian shall be filed by him in the surrogate's court of the county in which the infant resides, or if such infant be a nonresident, of the county in which such infant has property real or personal, and a minute thereof made and indexed in the book kept by the surrogate in which orders or decrees appointing guardians are entered. A guardian so appointed shall be subject to all the duties and liabilities of a general guardian specified in this article.

§ 183, *Sur. Ct. A. Former § 2653, Code Civ. Proc.*

In *Matter of Littman*, 88 Misc. Rep. 403, 150 N. Y. Supp. 607, Surrogate Fowler held that this section does not apply to appointments made by the Supreme Court before September 1, 1914, and denied an application to file an appointment.

¶ 95 Power and Jurisdiction of Surrogate's Court.

Power of court to appoint guardians.

The surrogate's court has the like power and authority to appoint a general guardian of the person or of the property, or both, of an infant, which the chancellor had, on the thirty-first day of December, eighteen hundred and forty-six. It has also power and authority to appoint a general guardian, of the person or of the property, or both, of an infant whose father or mother is living, and to appoint a general guardian of the property only, of an infant married woman. Such power and authority must be exercised in like manner as they were exercised by the court of chancery, subject to the provisions of this act.

§ 173, *Sur. Ct. A.* Former § 2643, *Code Civ. Pro.*

The surrogate not a chancellor.

Surrogates have not the general authority over infants and their estates that was formerly exercised by the chancellor. The statute falls far short of making chancellors out of surrogates, so far as general jurisdiction over minors and their property is concerned.

The likeness to the chancellor is in the power of appointment, not in the control of the infant's property after the appointment is made.

Guardian of an infant who has one or both parents living.

It needs no argument to show that the mother, in the absence of a father, has the right to influence and direct the conduct, residence, education, occupation, and associates of her infant child.

It is the duty of the surrogate to investigate the facts of the case, and only in a clear case to supplant a parent in her authority over her children, and that an apparent surrender on the part of the parent does not relieve the surrogate of his responsibility as the guardian of her true welfare.

By section 174 authority is vested in the surrogate to appoint a guardian of an infant whose parents are living; but it is manifest that that authority should never be exercised except in cases where the parents appear to be unfit for the control of their infant children, or where they have interests adverse to such minors. *Matter of Barre*, 5 Redf.

64; *Goodman v. Alexander*, 165 N. Y. 289; rev'g, 28 App. Div. 227, 50 N. Y. Supp. 884.

Guardian of an incompetent infant.

An infant may be of unsound mind and incapable of making a petition for the appointment of a guardian. This condition is provided for in section 175 (¶ 96) where it is provided that in such cases the infant need not make the petition although over fourteen years of age. It is probable that a committee could be appointed in the case of an incompetent infant. Where a guardian is appointed a committee could succeed him upon the arrival of the infant at twenty-one years of age. See ¶ 348.

Jurisdiction to appoint general guardian.

Where an infant has no guardian, a surrogate's court has jurisdiction to appoint a general guardian of an infant's person, or property, or of both, in the following cases:

1. Where the infant is a resident of that county, or has sojourned in that county for at least one year immediately preceding the application.
2. Where the infant is not a resident of the state, but has property, real or personal, situated in that county.

§ 174, *Sur. Ct. A. Former § 2644, Code Civ. Pro.*

The first sentence includes every case where the infant has no guardian. This includes the case where there has been a testamentary guardian, or a guardian by will or deed, but such guardian is no longer in office. See ¶ 100.

Much trouble has arisen in construing former sections 2822 and 2827, Code Civ. Pro., as to the residence of an infant, who has a father alive, but who does not live with the father, but is located permanently in the county.

The residence of the father is the residence of the infant, and therefore the surrogate of the county where the infant actually resided could not appoint a guardian. The change in subdivision one enables the surrogate of the county where the infant has "sojourned" for a year to acquire jurisdiction.

Prior appointment as affecting jurisdiction.

Where a guardian has been appointed in the Surrogate's Court of another county and has died or been removed, the application for the appointment of a successor should be made in the same county although the infant may have become a resident of another county. *In re Stein's Guardianship*, 98 Misc. Rep. 493, 164 N. Y. Supp. 930.

Determining age of an alleged infant.

Where the age of an alleged infant is not known and no better evidence can be secured, the child may be exhibited to the court or jury and the testimony of an expert introduced. Section 334, Civil Practice Act.

Nonresident infant.

A nonresident infant over fourteen years old may apply to the surrogate of any county in this State where he has any property for the appointment of a guardian of his person as well as of his property. While there is jurisdiction to appoint a guardian of the person in such a case, the court should ascertain whether there is a guardian of the person in the state of domicile, and should exercise its discretion not to appoint a guardian of the person, if such appointment would not be for the best interest of the infant. *Johnson v. Borden*, 4 Dem. 36.

A guardian of the person was not appointed where the infant was a nonresident, living with her stepfather. *Matter of Wildberger's Est.*, 25 Misc. Rep. 582, 55 N. Y. Supp. 1135.

Determining residence. See ¶ 18.

The assertion of jurisdiction by the surrogate in himself over an infant will not confer jurisdiction, but the surrogate may decide the question of residence on conflicting evidence and the decision will not be reversed on that ground. *Matter of Sherman*, 70 Hun, 465, 53 N. Y. St. Repr. 710, 24 N. Y. Supp. 283.

Domicile.

The amendment to this section giving jurisdiction where the infant has sojourned in the county for one year, must be considered in reading the cases decided before the amendment.

The domicile of the father is the domicile of his infant children and will control where an infant is brought into this State by stratagem for the purpose of attempting to give the court jurisdiction. *Matter of Hubbard*, 82 N. Y. 90.

The residence of an infant remains in the county where his parent died, unless legally changed. *Matter of Hughes*, 1 Tucker, 38.

Actual residence in the county has been held sufficient to give jurisdiction where both parents were dead, although the legal domicile of the infant at the surviving parent's last residence was in another county. *Matter of Pierce*, 12 Hun, 532. See also *Matter of Hubbard*, 82 N. Y. 90.

Changed by surviving parent or guardian.

Where a temporary guardian residing in another county supports the infant in that county, the infant upon arriving at fourteen years of age may apply to the surrogate of the county in which he resides for the appointment of a general guardian, the change of residence by the act of the guardian from one county to another in the same State not being disadvantageous to the infant. *Matter of Bartlett*, 4 Bradf. 221.

The remarriage of the mother does not necessarily change the domicile of her child to that of the stepfather. *Brown v. Lynch*, 2 Bradf. 214.

The domicile of origin can be changed only by choice, and the domicile of choice being that which the person himself establishes it cannot be acquired by the act of the minor, or by any other person save the father, or the mother being a widow and not having married again. *Matter of Dawson*, 3 Bradf. 130; *Matter of Daniels*, 71 Hun, 195, 53 N. Y. St. Repr. 859, 24 N. Y. Supp. 506.

Abandonment by parent.

When the father abandons and neglects to support a child, and the care and custody devolves upon the mother, the domicile of the child is no longer that of the father. *People v. Dewey*, 23 Misc. Rep. 267, 50 N. Y. Supp. 1013.

¶ 96 Petition, Citation and Hearing.**Petition for appointment of general guardian of infant; by whom made.**

A petition for the appointment of a general guardian of the person, or property, or both, of an infant over the age of fourteen years must be made by the infant, except that such a petition may be made by any person where such infant is of unsound mind or refuses to make such petition, and in the judgment of the surrogate it is necessary or proper that such a guardian should be appointed.

A petition for the appointment of a general guardian of the person, or property, or both, of an infant under the age of fourteen years may be made by any person in behalf of such infant.

§ 175, *Sur. Ct. A.* Former § 2645, *Code Civ. Pro.*

Except for this section no distinction is now made in the method of appointment of guardians for infants under or over fourteen years of age. This change does away with the term "temporary" guardian, and all guardians appointed by the court become general guardians. The privilege given to an infant under fourteen to change his guardian when arriving at that age, is given now in general terms to change a guardian at any time when the interest of the infant will be promoted thereby. § 99, ¶ 106.

Refusal by infant over fourteen to apply.

If the infant refuses to present a petition for the appointment of a general guardian, the surrogate, upon such notice as he may deem proper, may proceed to the appointment of a general guardian of the property of the infant. This change was made because under the law as it existed an infant over fourteen could wilfully refuse to apply for a guardian of his property, and in such a case no appointment could be made.

Petition for appointment of general guardian for infant; contents.

A petition for the appointment of a general guardian of an infant shall set forth:

1. The full name, residence and date of birth.
2. The names of the father and mother and whether or not they are living, and if living, their place of residence; the name and address of the person with whom such infant resides; and the names and addresses of the nearest next-of-kin of full age residing in the county, if both father and mother are dead.
3. Whether the infant has had, at any time, a guardian appointed by will or deed, or an acting guardian in socage, or a guardian of the person appointed pursuant to section eighty-six of the domestic relations law.
4. The estimated value of the personal property, and of the annual income from any other personal property or real estate, to which the infant is or will be entitled.
5. The facts upon which the jurisdiction of the court depends.
6. If either parent is living and there are reasons why the parent should not be appointed such guardian, the reasons therefor.
7. If the petitioner be a non-resident married woman, and the petition relates to personal property only, it must affirmatively show that the property is not subject to the control or disposition of her husband, by the law of the petitioner's residence, and must set forth the name and residence of such husband.
8. The petition may set forth the reasons why a person named therein would be a proper and suitable person to be appointed such general guardian.

§ 176, *Sur. Ct. A.* Former § 2646, *Code Civ. Pro.*

Subdivision 3 is new.

The right to nominate.

The former provision, making it necessary for an infant over fourteen to nominate a guardian, has been repealed, and in its place is a permission to nominate in all cases. Subd. 8.

Guardianship of the person of a married woman.

With regard to the appointment of a guardian of a married woman, this section and others relate only to the appointment of a guardian of her property. The surrogate has no jurisdiction to deprive the husband of the guardianship of the person of his wife which the marital relation gives him. See § 173, ¶ 95.

Who shall be cited; discretion of surrogate.

Upon presentation of the petition, a citation to show cause why the application should not be granted shall be issued as follows:

1. To the parent or parents, who are within the state and whose residences therein are known, or if there be none, to the grandparents who are within the county.

2. To the person having the care and custody of the infant, or with whom he resides.

3. If the application is made on behalf of an infant over fourteen years of age by any person on the infant's refusal to make such application, to the infant.

4. If the application is made by a married woman, to her husband only.

But no citation shall be necessary to a parent who has abandoned the infant, or is deprived of civil rights, or divorced from the petitioner because of his or her adultery, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child; or in case the petitioner is a married woman to a husband who has abandoned her, or is deprived of civil rights, or divorced because of his adultery, or adjudged to be insane or an habitual drunkard.

The surrogate must inquire and ascertain as far as practicable, what relatives of the infant reside in his county or elsewhere, and with whom the infant resides; and he may in his discretion cite any relative or class of relatives to show cause why the appointment should not be made.

§ 177, *Sur. Ct. A.* Former § 2647, *Code Civ. Pro.*

The exception after subdivision four meets a difficulty experienced in many cases where the conditions described therein existed, and it was necessary to cite persons who would never be appointed by the surrogate, and had forfeited all right to notice.

The former provision for ten days' service of citation upon the father has been omitted, and the usual service must be made upon all persons required to be cited, in the usual way.

It will be noticed that if there are no parents, citation must issue to the grandparents who are within the county. The well-known strong affection of grandparents for grandchildren justifies this new requirement.

Equal right of father and mother.

At the time of the enactment of the Code the father's right of custody and control of his infant children was superior to that of the mother, and the omission of the requirement of

notice to the mother was in harmony with that rule of law. By the Domestic Relations Law (§ 81) it was enacted that "a married woman is the joint guardian of her children with her husband, with equal powers, rights and duties in regard to them." This effected a change in the law and vested in the mother a substantial legal right to the custody of the person of her child co-equal with that of her husband. This right cannot be taken away from her or cut down in any degree by the order or decree of any court without notice to her and opportunity for making defense. From that time the discretion of the surrogate, on an application for guardianship of the person of an infant child, to give or not to the mother due notice of such application became a duty and a necessary condition for acquiring jurisdiction. *Matter of Drowne*, 56 Misc. Rep. 417, 107 N. Y. Supp. 1029.

The holding that a mother is the joint guardian of her child seems to be questioned by Surrogate Fowler in *Matter of Wagner*, 75 Misc. Rep. 419, 135 N. Y. Supp. 678, as applied to application for the appointment of a temporary guardian, it being his opinion that § 81, Domestic Relations Law applies to testamentary guardianship only.

Object in citing relatives.

Relatives cited in the discretion of the surrogate have no rights to enforce, but they are notified that the surrogate may learn from them such facts as he may desire to know. *Ex parte Dawson*, 3 Bradf. 130.

Hearing.

Where a citation is not issued, or upon the return of a citation, the surrogate must inquire into all the facts and circumstances regarding the infant, his condition in life and surroundings, and also must ascertain as nearly as practicable the value of his personal property or income from personal property and of the rents and profits of his real property.

§ 178, *Sur. Ct. A.* Former § 2648, *Code Civ. Pro.*

¶ 97 Decree; Who Should Be Appointed.**Decree appointing general guardian; term of office.**

If the surrogate is satisfied that the allegations of the petition are true in fact, and that the interests of the infant will be promoted by the appointment of a general guardian, either of his person, or of his property, or of both, he must make a decree accordingly. The same person may be appointed general guardian of both the person and the property of the infant, or the guardianship of the person and of the property may be committed to different persons. The surrogate may, in his discretion, appoint a person other than the father or mother of the infant, or other than the person nominated by the petitioner.

The term of office of a general guardian so appointed expires when the infant attains the age of twenty-one years.

§ 179, *Sur. Ct. A.* Former § 2649, *Code Civ. Pro.*

By the last sentence the term of office of all general guardians expires when the infant reaches twenty-one years. In theory the term of a temporary guardian under the former practice expired when the infant reached fourteen, but in practice it continued.

Term of office of guardian of married woman.

The lawful marriage of a woman before she attains her majority terminates a general guardianship with respect to her person, but not with respect to her property.

Domestic Relations Law, § 84.

Right of parents to the appointment should never be lightly overruled.

Where an infant has a parent living, it does not have arbitrary power to nominate a person other than its parent to act as guardian of its person, and it is only where the parent is not a responsible person that the court will appoint some stranger who may be nominated by the infant. In this connection it may be said that, while the court has a liberal discretion in determining who should be appointed a guardian of an infant, it should, nevertheless, respect the natural claim of a father to act as guardian of his own child, only refusing to recognize such right where the father is not a fit person and where the interests of the infant require the appointment of someone else.

There may be cases where the income derived from the father's labor is not so great as that of other applicants, yet this cannot

be said to be a reason for depriving him of his children. They are his children, and he is entitled to bring them up according to his means and his ability to do so, and he is not to be deprived of this privilege unless he is shown to be an unstable person and unmindful of his parental duty; but in none of the authorities or text books has the fact that his financial ability was not so great as that of some other persons who would be willing to take the infants been regarded as a sufficient ground to compel him to part with his children. *Matter of Tully Infants*, 54 Misc. Rep. 184, 105 N. Y. Supp. 858.

Unless the appointment of some other person is shown to be "expedient" the father or mother should be appointed. *Ledwith v. Ledwith*, 1 Dem. 154.

The expressed wish of the father as to the custody of an infant will have great weight in determining between rival applicants. *Matter of DeMarcell*, 4 Redf. 299; aff'd, 24 Hun, 207.

The fact that the mother of an infant over fourteen has remarried furnished no ground for rejecting her as guardian. *Matter of Hermance*, 2 Dem. 1; *Holley v. Chamberlain*, 1 Redf. 333, declared obsolete.

As the welfare of the child was the first thing to be considered, the surrogate refused to appoint the mother who was leading an immoral life. *Matter of Meech*, 25 N. Y. St. Repr. 167, 7 N. Y. Supp. 257.

Maternal aunt appointed over father, mother being dead. *Griffin v. Sarsfield*, 2 Dem. 4.

Wishes of the infant may be considered.

In determining the question of custody, the choice of the child, if of sufficient capacity, is an important consideration. *Matter of Burdick*, 41 Misc. Rep. 346, 84 N. Y. Supp. 932.

The wishes of the infant are too often not considered at all, and the result is that the law becomes, in the mind of the child, a tyrant, greater than any human being could become. Many a child upwards of twelve years of age has had his life blighted and harmed by being compelled to have as a guardian a person for whom he had no regard or affection, and who on account

thereof, could have no wholesome control over the infant either in discipline or in the development of his character.

Appointing stranger or trust company over competent relatives.

The surrogate is vested with discretionary power to appoint a stranger to be guardian of the person or property, or both, even when there are relatives competent to act, but the general rule is that he will not do so unless good reasons are shown why the interests of the infant require that the guardianship should not be given to any such relatives. In the case of *Matter of Buckler*, 96 App. Div. 397, 89 N. Y. Supp. 206, two sisters filed counter petitions, the estate of the infant was large, it appeared that there were differences among the members of the family; the discretion of the surrogate in appointing a trust company as guardian of the child was upheld.

Religious training should be considered.

It is the duty of the courts, so far as it consistently can be done, to see to it that guardians who have charge of the custody of infants should be of the same religion as the deceased parents, and should be earnest in following the religion of their deceased parents. *Matter of Crickard*, 52 Misc. Rep. 63, 102 N. Y. Supp. 440.

The father of a child has a natural right to decide what religious education his child shall receive, and after his death a guardian should, if possible, be appointed who will follow out his wish. The religious training of a child up to the time of the death of the parent should be considered, and no guardian should be appointed who would be likely to attempt to change such belief before the infant arrives at maturity, when he would be free to choose a religion approved by his judgment and conscience. *Matter of Jacquet*, 40 Misc. Rep. 575, 82 N. Y. Supp. 986; *Matter of McConnon*, 60 Misc. Rep. 22, 112 N. Y. Supp. 590.

The decree.

Entries in the minutes of the surrogate do not constitute the appointment of a guardian. Such appointment results from

several steps and culminates and is finished in the delivery to the guardian of the signed and sealed letters, after being recorded in the guardian's book. He gets no authority until they are signed and delivered, or at least are ready for delivery. *Potter v. Ogden*, 136 N. Y. 384; aff'd, 65 Hun, 27, 47 N. Y. St. Repr. 190, 19 N. Y. Supp. 594.

Surrogate is not required to appoint a guardian for an infant over fourteen years old unless he is convinced that the interests of the infant will be promoted thereby. *Ledwith v. Ledwith*, 1 Dem. 154.

Two guardians one for six months of the year and the other for six months are not desirable. *Matter of Annan*, 74 Hun, 19, 56 N. Y. St. Repr. 219, 26 N. Y. Supp. 528.

The surrogate may direct that certain persons be allowed to visit the ward. *Derickson v. Derickson*, 4 Dem. 295, 3 How. (N. S.) 21.

The same person may be appointed guardian of an infant in both capacities or the guardianship of the person and of the property may be committed to different persons.

The appointment of a guardian may be conditioned upon the infant receiving instruction in a specified religious faith, and the decree may make the appointment upon such condition. *In re Cross' Guardianship*, 92 Misc. Rep. 89, 155 N. Y. Supp. 1020.

Other things being equal a relative will be appointed before a person who is not a relative, and the person claiming must show that he is a relative. *In re Curtain*, 93 Misc. Rep. 394, 158 N. Y. Supp. 131.

The surrogate is not limited to appointing the person asked for in the petition. *In re Curtain*, 93 Misc. Rep. 394.

Trust company may be appointed.

The Banking Law specially authorizes the appointment of a trust company or certain banks as guardian of an infant. See ¶ 105.

A trust company may be appointed guardian of an infant's property while a relative is appointed guardian of the person.

Matter of Buckler, 89 N. Y. Supp. 206; *Ledwith v. Ledwith*, 1 Dem. 154.

Effect of surrender to institution.

A proper surrender to an institution by the father is not superseded by the appointment of a general guardian. *People, etc. v. Kearney*, 31 Barb. 430.

A guardian may be appointed, although the child has been surrendered to an institution by a written instrument signed by the father in his lifetime. *Kearney v. Brooklyn Ind. Sch.*, 1 Redf. 292.

¶ 98 Oath and Bond of Guardian of the Person and Property, of the Person Alone, and on Issue of Limited Letters.

Qualification of guardian of property.

Before letters of guardianship of an infant's property are issued by the surrogate's court, the person appointed must, take an official oath as prescribed by law and execute to the infant and file in the surrogate's office his bond, with at least two sureties, in a penalty, fixed by the surrogate, not less than twice the value of the personal property, and of the rents and profits of the real property, and of the annual income receivable by him from any funds of which the general guardian will not have possession, conditioned that the guardian will, in all things, faithfully discharge the trust reposed in him, and obey all lawful directions of the surrogate touching the trust, and that he will, in all things, render a just and true account of all moneys and other properties received by him, and the application thereof, and of his guardianship, whenever required so to do, by a court of competent jurisdiction; but the surrogate may, in his discretion, limit the amount of the bond to not less than twice the value of the personal property, and of the rents and profits of the real property, or such annual income receivable by him, for the term of three years.

Where the property of the infant does not exceed the sum, or value, of two thousand dollars, as shown by the petition, the surrogate, may, in his discretion, make an order dispensing with such bond wholly or partly, and directing that the guardian collect and receive the moneys and property of his ward jointly with a person designated in the order, and that all such moneys and other property, so far as the same are conveniently capable of deposit, shall be deposited in the name of such guardian, subject to the order of the surrogate, with such bank, savings bank, trust company, or safe deposit company as shall be

designated in such order, and shall be withdrawn or removed only on the order of the surrogate.

The letters issued thereupon shall contain the substance of the order.

The cost of the safe deposit box shall be a county charge.

§ 180, *Sur. Ct. A. Former § 2650, Code Civ. Pro.*

Associate guardian.

The section does not make it compulsory to appoint an associate, but leaves it to the discretion of the surrogate.

The constitutional jurisdiction of the Supreme Court over estates of infants cannot be abridged by an act of the Legislature, and this section does not curtail the powers of the Supreme Court heretofore possessed. *Matter of Hirshfield*, 88 Misc. Rep. 399, 151 N. Y. Supp. 846; *Matter of Kent*, 92 Misc. Rep. 113, 155 N. Y. Supp. 383.

Appointment of banking or trust company; official oath not required.

Upon the appointment of such trust company as executor, administrator, guardian, trustee, receiver or committee, no official oath shall be required. From § 188, Banking Law.

Oath.

The substance of the oath which must be taken and filed is found in § 98, ¶ 105.

Security.

The bond must be in twice the value of the personal estate and of the annual income from real and personal estate during the minority of the infant, except that the surrogate may in his discretion limit the bond as to such income to twice the income for three years. While the amount of security to be given by an administrator has been reduced, a guardian is still required to give a bond in double the amount of the personal property.

Where the amount of the infant's property does not exceed \$2,000, the surrogate may make an order appointing a third person to collect the property jointly with the guardian, and deposit it in a trust or safe deposit company subject to the order of the surrogate.

Proceeds of settlement of action on behalf of infant.

Where an action has been brought to recover damages on behalf of an infant, the Supreme Court will not order the proceeds to be paid to a guardian who has been appointed without bond pursuant to section 180. *Haug v. Hewitt*, 87 Misc. Rep. 67, 150 N. Y. Supp. 236; *Benson v. Simmons*, 156 N. Y. Supp. 1, 92 Misc. Rep. 509.

Reducing penalty of bond.

A guardian will not be allowed to withdraw his bond after it is once given and file another of a lesser penalty because he has disposed of the property or it proves to be of less value than it was originally estimated. *Matter of Patterson*, 39 N. Y. St. Repr. 849, 15 N. Y. Supp. 963.

However under section 111 (¶ 122) a new bond, with a smaller penalty may be authorized upon a judicial settlement.

Separate bonds for each infant.

Where the same person is appointed guardian of two or more infants a separate bond should be given to each infant, and not one bond to all the infants. Reasons for this requirement are founded on the facts that the estate of each infant may not be the same in amount, that there may be a default as to one and not as to another, and that a settlement and discharge as to one will take place prior to that of the others.

Bond of general guardian of person.

Before letters of guardianship of an infant's person are issued by the surrogate's court, the person appointed must take the official oath, as prescribed by law. The surrogate may also require him to execute to the infant a bond, in a penalty fixed by the surrogate, and with or without sureties, as to the surrogate seems proper; conditioned that the general guardian will in all things faithfully discharge the trust reposed in him, and duly account for all money or other property which may come to his hands, as directed by the surrogate's court.

§ 182, *Sur. Ct. A.* Former § 2652, *Code Civ. Pro.*

Limited and restrictive letters of guardianship. Bond.

In a case where a guardian of an infant is named or appointed, and it appears to be impracticable to give a bond sufficient to cover the whole amount

of the infant's personal property, the surrogate may, in his discretion, accept security, approved by him, not less than twice the amount of the particular portion of the infant's property which the guardian will be authorized under the letters to receive; and issue letters thereon limited to the receiving and administering only such personal property for which double the security has been given, and restraining the guardian from receiving any other personal property of the infant, until the further order of the surrogate, on additional further satisfactory security. § 181, *Sur. Ct. A.* Former § 2651, *Code Civ. Pro.*

This provision for limited letters to a guardian may be very useful in saving the expense of a large bond. Under it securities may be deposited so that the guardian cannot collect or dispose of them without application to the court, and a bond then required to cover only the cash transactions of the guardian when he collects income and disburses the same.

CHAPTER XXV.**Grant and Issue of Ancillary Letters of Guardianship. Letters to Guardian by Will or Deed. Annual Inventory and Account and Examination Thereof.**

- ¶ 99. § 184. Application for ancillary letters.
§ 185. Proceedings thereon.
§ 186. Effect of letters.
- ¶ 100. Appointment of guardian by will or deed.
§ 187. Will or deed to be recorded.
§ 188. Qualification; letters.
§ 189. Appointment of successor.
- ¶ 101. § 190. Annual inventory and account.
§ 191. Affidavit thereto.
§ 192. Annual examination.
§ 193. Proceeding when account defective.

¶ 99 Grant and Issue of Ancillary Letters of Guardianship.**Application for ancillary letters to foreign guardians.**

1. Where an infant, who resides without the state, and within the United States, is entitled to property within the state, or to maintain an action in any court thereof, a guardian of his property, who has been appointed by a court of competent jurisdiction, within the state or territory where the ward resides, and has there given security, in at least twice the value of the personal property, and of the rents and profits of the real property, of the ward, may present to the surrogate's court having jurisdiction, a petition, setting forth the facts, and particularly whether or not there are any debts due or to become due from the infant to a resident of this state, and that the security given is sufficient in amount to cover the property sought to be obtained through such letters, and that the court had jurisdiction of the infant, and praying for ancillary letters of guardianship accordingly. The petition must be accompanied with exemplified copies of the records and other papers, showing that he has been so appointed and has given the security required in this section, which must be authenticated in the mode prescribed in section forty-five of the decedent estate law, for the authentication of records and papers, upon an application for ancillary letters testamentary, or ancillary letters of administration. Such petition and authenticated records and papers shall be conclusive evidence of the facts therein set forth in any court of this state.

2. Where an infant, who resides without the state, and within a foreign country, is entitled to personal property within the state, or to maintain an action, or special proceeding in any court thereof respecting such personal property, a guardian of his property, authorized to act as such within the foreign

country where the ward resides, may apply to the surrogate's court of the county where such personal property or any part thereof is situated, for ancillary letters of guardianship on the personal estate of such infant and the person so authorized must present to the surrogate's court having jurisdiction a petition setting forth the facts and such additional allegations regarding debts and security as required in subdivision one of this section, and praying for ancillary letters of guardianship on the personal estate of such infant. The petition must be accompanied with the exemplified copies of the records and other papers showing the appointment of such foreign guardian, or where such foreign guardian has not been appointed by any court, with other proof of his authority to act as such guardian within such foreign country, and also with proof that pursuant to the laws of such foreign country, such foreign guardian is entitled to the possession of the ward's personal estate.

Exemplified copies of the records, where used pursuant to this subdivision, must be authenticated by the seal of the court, or officer by which or by whom such foreign guardian was appointed, or the officer having the custody of the seal or of the record thereof, and the signature of a judge of such court, or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by the certificate, under the principal seal of the department of foreign affairs, or the department of justice of such country, attested by the signature or seal of a United States consul. Such petition and authenticated records and papers shall be conclusive evidence of the facts therein set forth in any court of this state.

§ 184, *Sur. Ct. A.* Former § 2654, *Code Civ. Pro.*

Under this section there must be set up the debts due to residents, if any, the amount of security given in the foreign State, and a statement that such security is sufficient to cover the property of the infant in that State and the amount to be received by the aid of the ancillary letters in this State, and such statements are made conclusive evidence of such facts.

Prerequisites for application; nonresident infant residing within the United States.

The infant must reside without the State and within the United States; must be entitled to property within the State, or must be entitled to maintain an action in a court of this State; must have a general guardian of his property who has been duly appointed by a court of competent jurisdiction within the State or Territory where the infant resides, and who has given security in at least twice the value of the personal property and of the rents and profits of the real property of the ward.

Petition.

The petition must be in writing and verified, and must set forth the jurisdictional facts, and particularly whether or not there are any debts due or to become due from the infant to a resident of this State, and that the security given is sufficient in amount to cover the property sought to be obtained through such letters, and that the court had jurisdiction of the infant.

It must be accompanied by exemplified copies of the records and other papers showing that he has been so appointed and has given the security required in this section, which papers must be authenticated in the mode prescribed in section 45 of the Decedent Estate Law.

Prerequisites for application; nonresident infant residing in foreign country.

The same as under first subdivision except that the foreign guardian need not have given security.

The petition must be in writing and verified, setting forth jurisdictional facts, and whether the ward owes any debts to a resident of the State, and the same allegation regarding security, if any has been given, and praying that ancillary letters of guardianship on the personal estate of such infant be appointed.

It must be accompanied by exemplified copies of the records and other papers showing the appointment of such foreign guardian, or where such foreign guardian has not been appointed by any court, with other proof of his authority to act as such guardian within such foreign country, and also with proof that pursuant to the laws of such foreign country such foreign guardian is entitled to the possession of the ward's personal estate.

Authentication.

Exemplified copies of the records must be authenticated by the seal of the court or officer by which or by whom such foreign guardian was appointed, or the officer having the custody of the seal or of the record thereof, and the signature of a judge of

such court, or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by the certificate under the principal seal of the department of foreign affairs, or the department of justice of such country attested by the signature or seal of a United States consul.

Security and oath.

Ancillary letters are issued without security except as to debts, and without an oath of office. Sec. 186, Sur. Ct. A.

Where original letters have been granted.

Such letters do not supersede original letters granted in any county of this State which are still in force. Sec. 186, Sur. Ct. A.

Proceedings thereupon.

Where the surrogate is satisfied upon the papers presented, as prescribed in the last section, that the case is within that section, and that it will be for the ward's interest that ancillary letters of guardianship should be issued to the petitioner, he may make a decree granting ancillary letters accordingly. Such a decree may be made without a citation, or a citation may issue to such persons as the surrogate thinks proper, to show cause why the prayer of the petition should not be granted. But before the ancillary letters are issued, the surrogate must direct that any debts appearing to be due or owing from the infant to residents of this state be paid or security given therefor.

§ 185, Sur. Ct. A. Former § 2655, Code Civ. Pro.

While letters are issued without an oath or bond (§ 186) if it appears that there are debts due residents of the State, the surrogate may require those debts to be paid or security given therefor.

This section merely provides for the granting of letters to the petitioner, and not to the petitioner and another person jointly. There is no provision which authorizes the issuance of joint letters of guardianship in the Surrogate's Court. *In re Breese's Guardianship*, 156 N. Y. Supp. 267, 92 Misc. Rep. 650.

Effect of such letters.

Ancillary letters of guardianship are issued as prescribed in the last section, without security, except as provided in that section and without an oath of

office. If issued in a case provided for in subdivision one, of section 184, they authorize the person to whom they are issued to demand and receive the personal property, and the rents and profits of the real property of the ward; to dispose of them in like manner as a general guardian of the property appointed as prescribed in this article; to remove them from the state, and to maintain or defend any action or special proceeding in the ward's behalf. If issued in a case provided for in subdivision two, of section 184, such ancillary letters of guardianship authorize the person to whom they are issued to demand and receive the personal property of the ward, and to dispose of it in like manner as a guardian of property appointed as prescribed in this article, and to maintain or defend any action or special proceeding respecting such personal property in the ward's behalf. But in neither case do such letters authorize such ancillary guardian to receive from a resident guardian, executor, or administrator, or from a testamentary trustee, subject to the jurisdiction of a surrogate's court, money or other property belonging to the ward, in a case where letters have been issued to a guardian of the infant's property, from a surrogate's court of a county within the state, upon an allegation that the infant was a resident of that county, except by the special direction made upon good cause shown, of the surrogate's court from which the principal letters were issued, or unless the principal letters have been duly revoked.

§ 186, *Sur. Ct. A.* Former § 2656, *Code Civ. Pro.*

Authority under ancillary letters.

A foreign guardian is not entitled to receive a legacy due his ward, until he has taken out ancillary letters. *West v. Gunther*, 3 Dem. 386.

An ancillary guardian is not authorized to receive the award made to an infant for land taken for public use. *Matter of Sproat*, 69 N. Y. St. Repr. 743, 35 N. Y. Supp. 332.

An ancillary guardian may be duly appointed without giving additional security, and a payment to him by an executor or administrator will protect such executor or administrator. *Matter of Hunt*, 24 Civ. Pro. 239, 68 N. Y. St. Repr. 828, 34 N. Y. Supp. 1088.

¶ 100 Grant and Issue of Letters to Guardians by Will or Deed.

Appointment of testamentary guardian.

There was no right at common law for the appointment of a testamentary guardian by the parent. The same is entirely regulated by statute. Without reciting all the statutory enact-

ments since the year 1787 when the provisions of the English statute were embodied in our laws, it will always be found that "custody and tuition" is the language used in the different acts. Our first statutory enactment followed the English statute of 12 Car. 2, chap. 24, § 8, which authorizes the father "to dispose of the custody and tuition." The use of these words is historical and of legal significance. "Custody and tuition" have more than ordinary signification, for they include not only the person but the care and management of the personal estate, and also the profits of the real estate of the minor. That is, the guardianship of the person includes the guardianship of the estate.

Blackstone says: "The guardian with us performs the office both of tutor and curator of the Roman law, the former of which had charge of the education and maintenance of the minor, the latter, the care of his fortune; or, according to the language of the Court of Chancery, the tutor was the committee of the person; the curator, the committee of the estate. But these officers were frequently united in the civil law; with us, they are always united in the law with regard to minors, though as to lunatics and idiots, they are commonly kept distinct." 1 Blackst. Comm., chap. 17.

The attempted appointment by a testator of guardians both as to the person and the estate of the infant children, during the life of the maker, is invalid and without authority in law (*Matter of Zwickert*, 26 N. Y. Supp. 773, 5 Misc. Rep. 272; *Matter of Haggerty*, 9 Hun, 175; *Matter of Schmidt*, 77 id. 201; *Matter of Alexandre*, 70 N. Y. St. Repr. 431), and, therefore, appointments of guardians by the Surrogate's Court control. Though the Surrogates' Court Act likewise provides that the surrogate may vest guardianship of the person and estate of a minor in separate persons there is no power to do so residing in the surviving parent. In other words, the power to nominate different individuals in the two capacities for the control of the estate and the person resides alone in the court. *Matter of Burdick*, 47 Misc. Rep. 28, 95 N. Y. Supp. 206.

This case was affirmed in *Matter of Kellogg* (110 App. Div.

472), but was reversed by holding that the appointment was a power in trust. (187 N. Y. 355.)

Invalid appointment may sometimes be given effect as a power in trust.

"There have been several cases in which a testator not legally authorized to do so has assumed to appoint the guardian of minor beneficiaries under his will. In such cases, with but a single exception, so far as I can find, the appointment of a guardian over such property as the testator bequeathed or devised has been upheld either as a trust or a power in trust. A power may be created for any lawful purpose and to do any act which the grantor might himself do (Real Property Law, § 131; *Belmont v. O'Brien*, 12 N. Y. 394; *Downing v. Marshall*, 23 id. 366), and the statute equally applies to powers over personalty (*Cutting v. Cutting*, 86 N. Y. 522). Therefore, had the testator instead of appointing the appellants guardians of his children with the direction 'that all funds and securities belonging to each of my children shall be received, held, and paid out by them jointly as said guardians,' said in express terms, 'I direct said persons to have the same care, custody and control during their minority over the property I give my children that a guardian would have,' it would have created a valid power in trust (*Blanchard v. Blanchard*, 4 Hun, 287; aff'd, 70 N. Y. 615), and to my mind he has said substantially the very same thing." *Matter of Kellogg*, 187 N. Y. 355; rev'g, 110 App. Div. 472.

The same principle was applied where the attempted appointment of a guardian extended beyond the period of minority. *In re Wohlers*, 98 Misc. Rep. 500, 164 N. Y. Supp. 936.

For a careful study of this subject see *Matter of Scoville*, 72 Misc. Rep. 310, 131 N. Y. Supp. 205.

Appointment by will or deed of parent.

A married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in regard to them. Upon the death of either father or mother, the surviving parent, whether of full age or a minor, of a child likely to be born, or of any living child, under the age of twenty-one years and unmarried, may, by deed or last will, duly executed, dispose of the custody and tuition of such child during its minority or for any less time, to any person or

persons. Either the father or mother may in the lifetime of them both, by last will duly executed, appoint the other the guardian of the person and property of such child, during its minority. A person appointed guardian in pursuance to this section shall not exercise the power or authority thereof unless such will is admitted to probate, or such deed executed and recorded as provided by section twenty-eight hundred and fifty-one of the Code of Civil Procedure.

§ 81, *Domestic Relations Law*.

By the amendment of 1899 the right of one parent to appoint the other was granted so that such cases as *Matter of Alexandre* (70 N. Y. St. Repr. 431), holding that one parent cannot appoint the other, no longer state the law.

By will.

No guardian can be appointed by will of one parent while the other survives unless the appointee is such survivor. *Matter of Kellogg*, 187 N. Y. 355; rev'g, 110 App. Div. 472.

Mother divorced from her husband. Decree awarded her the custody of the children, and she attempted to appoint a testamentary guardian—*held* invalid. *Matter of Waring*, 46 Misc. Rep. 222, 94 N. Y. Supp. 82.

The appointment by will of a guardian for an infant who resides out of the State may be held to change the domicile of an infant to the domicile of such guardian. *Matter of Kiernan*, 38 Misc. Rep. 394, 77 N. Y. Supp. 924.

Effect of annulment of marriage.

Section 1745, Code Civ. Pro., made a special provision that where a marriage was annulled on the ground that one of the parties had a husband or wife living, the innocent party might appoint a guardian by will or deed of a child of the marriage. Section 1134 of the Civil Practice Act which refers to annulment for such a cause does not contain the additional provision, but section 1135, Civ. Prac. A., makes regulations in that and other cases where a marriage is annulled that the judgment shall designate of which parent, if either, the issue shall be treated as legitimate, and when so fixed it is evident that in law the child would have but one parent, and that one could appoint a guardian by will or deed.

Will or deed containing appointment to be proved, et cetera, and recorded.

A person shall not exercise, within the state, any power or authority, as guardian of the person or property of an infant, by virtue of an appointment contained in the will of the infant's father or mother, being a resident of the state, and dying after this act takes effect, unless the will has been duly admitted to probate, and recorded in the proper surrogate's court, and letters of guardianship have been issued to him thereupon; or by virtue of an appointment contained in a deed of the infant's father or mother, being a resident of the state, executed after this act takes effect, unless the deed has been acknowledged or proved, and certified, so as to entitle it to be recorded, and has been recorded in the office for recording deeds in the county, in which the person making the appointment resided, at the time of the execution thereof. Where a deed containing such an appointment is not recorded, within three months after the death of the grantor, the person appointed is presumed to have renounced the appointment; and if a guardian is afterward duly appointed by a surrogate's court, the presumption is conclusive.

§ 187, *Sur. Ct. A.* Former § 2657, *Code Civ. Pro.*

The section applied.

This section relates only to procedure and does not permit the mother to appoint by will, the father being alive. *Griffin v. Sarsfield*, 2 Dem. 4.

In re Gibbs, 96 Misc. Rep. 537, 160 N. Y. Supp. 686, the history of these sections is traced and it is held that the law is settled that an appointment of a testamentary guardian by deed can hold no force or effect during the life of the grantor in the deed. *Matter of Schuler*, 46 Misc. Rep. 373, 94 N. Y. Supp. 1063.

Guardian by will or deed; qualification, letters, et cetera.

Where a will, containing the appointment of a guardian, is admitted to probate, or a deed is recorded as provided in the foregoing section, the person appointed guardian, must, within thirty days thereafter, qualify by taking and filing his oath of office, and a bond as fixed by the surrogate, unless contrary to the express provision of the will or deed, and by filing a petition or affidavit setting forth the facts which entitle him to so qualify and receive letters; except that a trust company so named, instead of filing such oath and bond, shall file a consent to accept such appointment duly executed and acknowledged; otherwise he is deemed to have renounced the appointment. But the surrogate, either before or after the expiration of thirty days, may extend the time so to qualify, upon good cause shown, for not more than three months. A person appointed guardian by will or deed, may at any time before he qualifies, renounce the appointment by a written instrument, acknowledged, or proved, and duly certified, and filed in the surrogate's office. § 188, *Sur. Ct. A.* Former § 2658, *Code Civ. Pro.*

This section applies to guardians by deed as well as to guardians by will. Both must give a bond to be fixed in amount by the surrogate, unless the will or deed expressly exempts the guardian from giving a bond or the case falls within the exemption of section 180. Objection to grant of letters may be taken as provided for in § 96, ¶ 105.

In *Matter of Huebsch*, 87 Misc. Rep. 566, 151 N. Y. Supp. 377, where the question arose whether a bond should be required where the infant's estate was less than two thousand dollars, the surrogate of Bronx county held that this section should be construed with section 2650 (now § 180), and that a bond need not be given, but that an associate guardian might be appointed and the fund deposited subject to the order of the surrogate.

The words "acknowledged, or proved, and duly certified" are defined in § 314, subd. 15.

A trust company, when named, files a consent showing its willingness to accept the trust. See ¶ 105.

In what surrogate's court proceedings should be taken. See ¶ 16.

Where any prior proceedings have been had in a Surrogate's Court, all subsequent proceedings should be had in the Surrogate's Court of that county so that the records as to the guardianship may be in one Surrogate's Court. *Matter of Mayilton*, 98 Misc. Rep. 420, 164 N. Y. Supp. 745; *Matter of Stein*, 98 Misc. Rep. 493, 164 N. Y. Supp. 930.

Must qualify within thirty days or obtain order extending time.

After the probate of the will an affidavit or petition should be presented setting forth the right to qualify, such as the probate of the will, that thirty days have not elapsed, that the applicant is the surviving parent or that no parent survives, and that the applicant has taken and filed the oath of office. If thirty days have elapsed the applicant should excuse the default and show that no other person has been appointed.

Guardian entitled to qualify upon a contingency.

Where a person is to become a testamentary guardian upon

the happening of a contingency he must qualify within thirty days, from the happening of the contingency or he will be deemed to have refused the appointment. *Matter of Constantine*, 16 Civ. Pro. 262, 22 N. Y. St. Repr. 883, 5 N. Y. Supp. 554.

Order that letters issue.

An order should be entered that letters issue reciting the jurisdictional facts, such as that the will containing the appointment has been duly admitted to probate and recorded, that no parent survives, or that the applicant is the surviving parent, and that the applicant has taken and filed an oath of office and a bond approved by the surrogate.

Letters to nonresidents.

A nonresident who is not an alien may receive letters. *Matter of Welsh*, 50 App. Div. 189, 63 N. Y. Supp. 737; *Matter of Zeller*, 25 Misc. Rep. 137, 54 N. Y. Supp. 926; *Matter of Taylor*, 3 Redf. 259.

Appointment of successor.

Where no guardian appointed by will or deed remains in office on account of resignation, removal, or death, a general guardian may be appointed by the surrogate's court, with all the powers conferred by the will or deed and with the effect prescribed in section 93 of this act.; unless such an appointment would contravene the express terms of the will or deed.

§ 189, *Sur. Ct. A. Former* § 2659, *Code Civ. Pro.*

An appointment may be made when no guardian remains in office, no matter what the reason is for the office being vacant.

Such appointment will be that of a general guardian with the powers conferred by the deed or will. See § 174, ¶ 95.

The general powers of the successor, in addition to the special powers conferred by the will or deed, are the same as when a successor is appointed generally. See § 93, ¶ 103.

¶ 101 All Guardians Must File Annual Inventory and Account; Examination Thereof.

Guardian to file annual inventory and account.

A guardian of an infant's property must, in the month of January of each year, as long as any of the infant's property, or of the proceeds thereof, remain under his control, file in the Surrogate's Court the following papers::

1. An inventory, containing a full and true statement and description of each article or item of personal property of his ward, received by him, since his appointment, or since the filing of the last annual inventory, as the case requires; the value of each article or item so received; a list of the articles or items, remaining in his hands; a statement of the manner in which he has disposed of each article or item, not remaining in his hands; and a full description of the amount and the nature of each investment of money, made by him.

2. A full and true account, in form of debtor and creditor, of all his receipts and disbursements of money, during the preceding year; in which he must charge himself with any balance remaining in his hands, when the last account was rendered, and must distinctly state the amount of the balance remaining in his hands, at the conclusion of the year, to be charged to him in the next year's account.

3. The names and residences of the sureties on his bond; if natural persons whether they are living; and whether the security of the bond has become impaired.

4. The guardian of an infant's property may be required by the surrogate, with the annual account of the infant's property, to produce for examination by the surrogate, all securities or evidences of deposit or investment, which he has relating to the disposition of the estate of the infant.

§ 190, *Sur. Ct. A.* Former § 2660, *Code Civ. Pro.*

This section applies to all guardians, including testamentary guardians, and those appointed by the Supreme Court.

Pension department rule for biennial accountings and certificate.

"Biennially every guardian or other person acting in a fiduciary capacity, receiving the pension of his or her ward or wards, will be required to file with the pension agent by whom the pension is payable a certificate of the court having probate jurisdiction, showing that the guardian or person acting in a fiduciary capacity has properly accounted to the court, as required by law, and that the account has been approved; or, in the event that the requirement of accounting has been waived, the certificate will show this fact, instead of that the account has been rendered and approved."

Filing annual account.

Few guardians seem to appreciate the benefit to themselves

and their own interests of the requirement for filing annual accounts. By doing so they have a safe and permanent record of all their accounts preserved by the court, where they or their representatives, after their death, may get information for their final accounting and discharge which may become lost during the many years which often cover the period of a guardianship.

The filing of the annual account in the first instance is *ex parte* and the surrogate is charged with the duty of seeing that the statute is complied with. It is not in the nature of a judicial settlement, but a provision to protect the ward's estate, and prevent its dissipation through the carelessness or malfeasance of the guardian. *Welch v. Gallagher*, 2 Dem. 40.

The guardian need not serve a copy of the annual account upon his sureties, but the practice of doing so is very desirable. *Matter of Bushnell*, 17 N. Y. St. Repr. 824, 4 N. Y. Supp. 472.

Affidavit to be annexed thereto.

With the inventory and account, filed as prescribed in the last section, must be filed as an affidavit, which must be made by the guardian, unless, for good cause shown in the affidavit, the surrogate permits the same to be made by an agent or attorney, who is cognizant of the facts. The affidavit must state, in substance, that the inventory and account contain, to the best of the affiant's knowledge and belief, a full and true statement of all the guardian's receipts and disbursements, on account of the ward; and of all money and other personal property of the ward, which have come to the hands of the guardian, or have been received by any other person by his order or authority, or for his use, since his appointment, or since the filing of the last annual inventory and account, as the case requires; and of the value of all such property; together with a full and true statement and account of the manner, in which he has disposed of the same, and of all the property remaining in his hands, at the time of filing the inventory and account; and a full and true description of the amount, and nature of each investment made by him, since his appointment, or since the filing of the last annual inventory, and account, as the case requires; and that he does not know of any error or omission in the inventory or account, to the prejudice of the ward. § 191, *Sur. Ct. A.* Former § 2661, *Code Civ. Pro.*

Annual examination of guardian's accounts.

In the month of February of each year and thereafter until completed, the surrogate must, for the purpose specified in the next section, examine or cause to be examined, under his direction, all inventories and accounts of guardians filed since the first day of February of the preceding year. The examination may be made by the clerk of the surrogate's court or by a person specially ap-

pointed by the surrogate to make it, who must, before he enters upon the examination, subscribe and take before the surrogate, and file with the clerk of the surrogate's court, an oath faithfully to execute his duties and to make a true report to the surrogate. § 192, *Sur. Ct. A. Former* § 2662, *Code Civ. Pro.*

Proceedings, when account defective, etc.

If it appears to the surrogate, upon an examination made as prescribed in the last section, or by the report of such special examiner, that a guardian of an infant's property, has omitted to file his annual inventory or account, or the affidavit relating thereto as prescribed in the last section but one; or if the surrogate is of the opinion, that the interest of the ward requires that the guardian should render a more full or satisfactory inventory or account; or where the surrogate has reason to believe that sufficient cause exists for the guardian's removal, the surrogate may, in his discretion, appoint a fit and proper person special guardian of the ward, for the purpose of filing a petition in his behalf, for the removal of the guardian, and prosecuting the necessary proceedings for that purpose. And in a like case where said special examiner has been appointed, the surrogate shall make an order appointing said examiner special guardian of such infant with authority to procure the filing of an amended account or a proper account, and to prosecute a proceeding for the removal of such guardian when necessary. The surrogate in all cases of examination or prosecution as aforesaid shall fix the fees and compensation of such special examiner and special guardian, and may in his discretion make an order charging them in whole or in part upon the guardian personally, the fund in his hands, or upon the county, in which latter case he shall certify the items thereof to the board of supervisors of the county or in the city of New York to the proper officers, and the same shall be audited and paid as other county or city charges.

§ 193, *Sur. Ct. A. Former* § 2663, *Code Civ. Pro.*

It is most important that the surrogate should have ample authority and proper facilities for making an examination of the annual accounts of all guardians. This section provides for the appointment and compensation of a special examiner, when necessary, to not only make a thorough examination of such accounts, but to conduct a proceeding to obtain a proper account or the removal of the guardian who may have been found to have made improper use of the infant's funds.

This examination now may, by a recent addition to section 190, require through the surrogate a production of the securities for examination by him in order that he may ascertain and report whether such securities are legal investments for guardians to make.

CHAPTER XXVI.

Letters, Their Classes, Requisites, Priorities and Authority; How, When and to Whom Granted.

- ¶ 102. Letters classified and defined.
- § 88. Requisites of letters.
Amending letters.
- § 89. Limited and restrictive letters.
- § 90. Evidence of authority.
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- § 92. Reckoning time on successive letters.
- § 93. When successor appointed.
- ¶ 104. § 94. Persons incompetent to act.
- ¶ 105. § 95. Surrogate may refuse letters.
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- § 97. Bond after objection proved.
- § 98. Official oaths.

¶ 102 Letters Classified and Defined; Their Requisites; Evidence of Authority; Amending.

Letters defined and classified.

Letters granted by the surrogate show the authority of the representative to act. They are of the following kinds:

1. Letters testamentary which are issued to one or more executors named in a will after it has been duly probated.

2. Letters of administration with the will annexed, which are granted to a person entitled where no executor is named in the will, or where all so named have died, either before or after the will has been probated, or have resigned or been removed.

3. Letters of administration, which are issued to a person entitled where the deceased died intestate.

4. Letters of temporary administration, which are issued when it is necessary to have a representative of an estate qualified to act before letters testamentary or of administration can be issued.

5. Limited letters of administration or of guardianship,

which are granted with power to act thereunder specially limited.

6. Letters *de bonis non*, which are granted where all the persons who have received letters have died, been removed or resigned.

7. Letters of guardianship, which are issued on the person or property or both of an infant.

8. Letters of guardianship issued under appointment by will or deed.

9. Ancillary letters, issued after an original appointment in another State or county.

Requisites of letters.

Letters testamentary, letters of administration, and letters of guardianship must be in the name of the people of the state. Where they are granted by a surrogate, they must be attested in the name of the officer granting them, signed by him, or by the clerk of the surrogate's court, and sealed with the seal of the surrogate's court. Where they are issued out of another court, they must be attested in the name of the judge holding the court, signed by the clerk thereof, and sealed with its seal.

To all letters of guardianship of the property of an infant the surrogate must cause a copy of sections 190 and 191 of this act to be annexed or to be printed thereupon.

§ 88, *Sur. Ct. A.* Former § 2558, *Code Civ. Pro.*

Petition for letters testamentary or of administration should show different spelling of name, if any.

Great care should be exercised before letters are formally written and granted, so that they shall run in the correct name of the deceased and if the deceased has used in his business transactions his name in a peculiar and unusual manner, that fact should be ascertained before the petition is drawn and before letters are granted, so that both names may be set up in the letters.

For instance—A man may ordinarily transact his business in the name of G. F. Rising, or he may execute his will and perhaps have a bank-book in the name of George F. Rising or George Frank Rising. If he is named in only one of these forms in the letters, trouble may be experienced in drawing

bank deposits or transferring securities wherein either one of the other names has been used.

This trouble may be obviated by making an examination of bank-books and securities before petition for probate or administration is drawn and by setting up in the petition the use of these various names and having the letters run in all of such names. If, however, by inadvertence or lack of knowledge that these various names have been used, letters are issued in the one name, an application may be made after the grant of letters for an order amending them.

Petition to amend letters.

A petition may be made by the executor or administrator setting up the grant of letters in the one name and that it has been ascertained that the deceased in the transaction of his business used other forms of the same name and praying that the letters may be amended so as to contain each of such names, for example, G. Frank Rising, known also as George F. Rising and George Frank Rising. Upon such petition the surrogate will make an order amending the letters to conform thereto and new letters will be issued in accordance therewith, and subsequently a certificate of the grant of letters may be issued accordingly, which may be filed with the bank or corporation which will authorize the collection or transfer of property standing in either of such names.

Limited and restrictive letters.

Letters may be granted limiting and restricting the powers and rights of the holders thereof as follows:

To an executor or administrator where a right of action exists.

To a general guardian where his possession and control of certain property of his ward is limited as provided in section 180 of this act.

§ 89, *Sur. Ct. A.* Former § 2559, *Code Civ. Pro.*

Limited letters of administration are considered in paragraph 87, and of guardianship in paragraph 98, as to both sections 180 and 181 as authorizing limited letters.

Letters issued under section 90 are also restrictive letters

as they limit the powers which the representative would otherwise have, but for the taking of an appeal.

Letters evidence of authority; effect of appeal.

Subject to the provisions of the next section, regulating the priority among different letters, letters testamentary, letters of administration, and letters of guardianship, granted by a court or officer having jurisdiction to grant them, are conclusive evidence of the authority of the persons to whom they are granted, until the decree granting them is reversed upon appeal, or the letters are revoked.

When letters testamentary or letters of administration have been issued in accordance with an order of the surrogate as authorized in section 87 of this act, such letters so issued confer upon the person named therein all the powers and authority, and subject him to all the duties and liabilities of an executor or administrator in an ordinary case, except that they do not confer power to sell real property by virtue of a provision in the will, or to pay or to satisfy a legacy, or distribute the unbequeathed property of the decedent, until after the final determination of the appeal; and in case letters shall have been issued before such appeal, the executor or administrator, on a like order of the surrogate, may exercise the powers and authority, subject to the duties, liabilities and exceptions above provided.

§ 90, *Sur. Ct. A.* Former § 2560, *Code Civ. Pro.*

Letters issued after an appeal may be in effect limited letters, for the representative is restricted as to his rights and privileges thereunder.

Authority under letters relates back to date of death; exception.

We sometimes find it stated in general language that the appointment of an executor or administrator relates back to the death of the intestate. *Allen v. Eighmie*, 9 Hun, 201. This rule, however, has been held not to be broad enough to sustain an action brought by one who at the time the action was commenced had no letters, but who received them afterwards. *Gatfield v. Hanson*, 57 How. Prac. 331; *Thomas v. Cameron*, 16 Wend. 579; *Bellinger v. Ford*, 21 Barb. 311. See, also, *Dutcher v. Dutcher*, 88 Hun, 221, 34 N. Y. Supp. 653. As the executor gets his office from the will, he had at common law broad powers before probate; but even these have been limited by statute. On the other hand, the office of administrator is derived entirely from the letters granted

by the surrogate. Nor can the doctrine of relation avail to sustain an action brought before letters granted, and upon a cause of action not derived from decedent nor belonging to decedent's estate, but given by statute direct to the executor or administrator. *Smith v. N. Y. C. R. R.*, 171 N. Y. Supp. 64.

Letters are prima facie proof of death.

Where the surrogate has tried the question of the fact of death and found the fact upon sufficient evidence, letters issued are *prima facie* evidence of death and valid until revoked and such letters will protect innocent parties acting upon the faith of them. *Roderigas v. East R. Savings Inst.*, 63 N. Y. 460; *Carroll v. Carroll*, 60 N. Y. 121.

When letters of administration have been granted upon the estate of one dying intestate in the county of the surrogate, the burden is upon one disputing the title and authority of the administrator to show a want of jurisdiction in the surrogate to grant the letters. *Welch v. N. Y. C. R. R. Co.*, 53 N. Y. 610.

Effect of irregularity.

The fact that there was no petition for administration and that the bond was not double the amount of the property cannot be raised collaterally. *Lowman v. Elmira, C. & N. R. R. Co.*, 85 Hun, 188, 32 N. Y. Supp. 579, 65 N. Y. St. Repr. 723; *aff'd*, 154 N. Y. 765; *Sullivan v. Tioga R. R. Co.*, 44 Hun, 304, 7 N. Y. St. Repr. 627.

Failure to cite a widow upon application for letters is an irregularity but does not render the letters issued void. *Kelly v. West*, 80 N. Y. 139.

Difference between letters based on residence and those based on location of property. See ¶ 111.

Letters testamentary or of administration may be issued at the place of domicile, the jurisdiction to issue them being found in the fact of the domicile. Such letters are known as

domiciliary letters. Or they may be issued at any place wherein personal property of the deceased is found, the jurisdiction to issue them being found in the *situs* of the property to be administered. Such letters are known as ancillary letters, and they are none the less ancillary because no letters may have been issued in the jurisdiction of the domicile. The ancillary administration is not dependent upon the domiciliary, but each is distinct and independent within the limits of its exclusive authority. Strictly speaking, an executor or administrator, whether domiciliary or ancillary, has as matter of right no extraterritorial authority; but in the case of a domiciliary representative it is established by comity between States and nations (and in some States by statute) that while no one beyond the jurisdiction of his appointment is bound to recognize him, yet, that persons outside the jurisdiction who deal with him will be protected at least until a demand is made upon them by a local representative. This recognition of the title of a domiciliary representative outside the jurisdiction of his appointment rests upon the rule of law that the *situs* of personal property is deemed to be at the domicile of the decedent, and that the courts of the domicile have assumed jurisdiction over it by the issue of the letters.

The rule as to the authority of an ancillary executor or administrator is quite different. The jurisdiction to appoint him rests upon the fact that the actual *situs* of the personal estate is within the State or county issuing the ancillary letters, and it is only over such property that the court issuing the letters has assumed jurisdiction. The authority of the ancillary representative is, therefore, strictly limited to personal property within the jurisdiction of his appointment, that is to say, to property having a *situs* within that jurisdiction. *Lockwood v. U. S. Steel Corp.*, 153 App. Div. 655, 138 N. Y. Supp. 725.

Effect of appeal upon issue of letters, and authority thereunder. See § 87; ¶ 34.

Considering sections 87 and 90, it becomes clear that the

effect of a perfected appeal is to stay the execution of the decree, and if perfected before letters are issued, letters can only issue on an order of the surrogate; and if the appeal is taken after letters issued, the executors can only act if such an order is made after the appeal is taken. And then the letters are restricted to the limited powers above specified. If such an order is not made, then the executors are stayed from exercising their power or authority. *Matter of Place*, 5 Dem. Sur. 228; *Matter of Choate*, 105 App. Div. 356, 94 N. Y. Supp. 176; *Matter of Dayton*, 100 Misc. Rep. 632, 166 N. Y. Supp. 951; *In re Kennedy*, 186 App. Div. 19, 174 N. Y. Supp. 95.

Application to the surrogate for issue of letters testamentary after appeal not granted where a temporary administrator has been appointed and there did not appear to be a present necessity for a representative with more power. *Matter of Gihon*, 27 Misc. Rep. 626, 59 N. Y. Supp. 494.

This section seems to contemplate an express order enabling the representative to act. *Matter of Hopkins*, 95 App. Div. 57; aff'g, 41 Misc. Rep. 83, 85 N. Y. Supp. 35.

In the cases provided for in this section there is no provision for any other undertaking to effect a stay. *Fernbacher v. Fernbacher*, 4 Dem. 227.

This section embraces an appeal from a decree removing a testamentary trustee. *Stout v. Betts*, 74 Hun, 266, 56 N. Y. St. Repr. 356, 26 N. Y. Supp. 809.

The appeal in a probate case removes the matter to the appellate court and the surrogate has no jurisdiction to make any further order in relation to such proceeding. *Matter of Murphy*, 79 App. Div. 541, 81 N. Y. Supp. 102.

Appeal from order denying application for commission does not stay the hearing. *Henry v. Henry*, 4 Dem. 253.

Appeal from an order denying right to intervene not sufficient to stay proceedings under probated will. *Matter of Evans*, 33 Misc. Rep. 671, 68 N. Y. Supp. 937; aff'd, 58 App. Div. 502, 69 N. Y. Supp. 482.

The enforcement of a decree or an order, which is stayed by a perfected appeal, properly applies to the collection of money, the requiring the delivery of property, the committing for contempt, or other of the things required to be done by the person against whom the order was directed, and not to an order refusing a reference and directing trial by the surrogate. *Matter of Williams*, 135 App. Div. 123.

Powers suspended on failure to file inventory.

See section 198, Surrogate's Court Act, and paragraph 190, *post*.

¶ 103 Priority Among Letters; Time, How Reckoned on Successive Letters; When Successor May Be Appointed.

Priority among different letters.

A person to whom letters are first issued from a surrogate's court having jurisdiction to issue them, has sole and exclusive authority, pursuant to the letters, until the letters are revoked; and he is entitled to demand and recover from any person, to whom letters are afterwards issued, by any other surrogate's court, the property in his hands belonging to the estate or fund. But the acts of a person, to whom letters were afterwards issued, done in good faith, before notice of the letters first issued, are valid; and an action or special proceeding commenced by him, may be continued by and in the name of the person or persons to whom the letters were first issued.

§ 91, *Sur. Ct. A.* Former § 2561, *Code Civ. Pro.*

The right and power to continue and complete the duties of the office follow to the successor generally as specified in section 93, *post*.

Time, how reckoned upon successive letters.

Where it is prescribed by law, that an act must or may be done within a specified time after letters are issued, and successive or supplementary letters are issued upon the same estate, the time so specified must be reckoned from the issuing of the first letters, except in a case where it is otherwise specially prescribed by law; or where the first or any subsequent letters are revoked, as prescribed in section 154 of this act, by reason of the want of power in the surrogate's court to issue the same, for any cause.

§ 92, *Sur. Ct. A.* Former § 2562, *Code Civ. Pro.*

This section does not permit the time of one year, after which a compulsory accounting can be required, to be computed from the date of first granting letters to a representative who has died. In such cases the requirement is that one year must have elapsed since letters were issued to him. § 258. *Matter of Crowley*, 33 Misc. Rep. 624, 68 N. Y. Supp. 939.

When surviving or remaining representatives may act; when successor must be appointed.

Where one of two or more executors or administrators dies, or where letters are revoked with respect to one of them, a successor to the person who dies, or whose letters are revoked, shall not be appointed, except where such an appointment is necessary, in order to comply with the express terms of a will; but the others may proceed and complete the administration of the estate pursuant to the letters, and may continue any action or special proceeding brought by or against all.

Where all the persons to whom letters have been issued die, or where the letters of all have been revoked by a decree of the surrogate's court, that court has, except in a case where it is otherwise specially prescribed by law, the same power to appoint a successor to the person or persons whose powers have ceased, as if the letters had not been issued. The successor may complete the execution of the trust committed to his predecessor; he may continue in his own name, a civil action, or special proceeding, pending in favor of his predecessor; and he may enforce a judgment, order, or decree, in favor of the latter.

§ 93, *Sur. Ct. A. Former* § 2563, *Code Civ. Pro.*

Where one qualified executor remains he is the successor, and no new appointment is necessary. *Hood v. Hayward*, 48 Hun, 330, 15 N. Y. St. Repr. 846, 1 N. Y. Supp. 566; *Boyle v. St. John*, 28 Hun, 454.

Where an executor is removed and has settled his accounts and paid over all money, he is no longer a necessary party to any proceeding regarding the estate. *Earle v. Earle*, 93 N. Y. 104.

An executor in a will proved after letters of administration have been issued is a successor to such administrator. *Power v. Speckman*, 126 N. Y. 354.

¶ 104 Persons Incompetent to Act as Representative, Guardian, or Testamentary Trustee.

Persons incompetent to receive letters, or act as testamentary trustee.

No person is competent to serve as an executor, administrator, testamentary trustee or guardian, who is:

1. Under the age of twenty-one years;
2. An adjudged incompetent;
3. An alien not an inhabitant of this state;
4. A felon;
5. Incompetent to execute the duties of such trust by reason of drunkenness, dishonesty, improvidence or want of understanding.

Except as prescribed in section 97, an executor, testamentary guardian or testamentary trustee, who is not by law required to give a bond, shall not qualify or serve as such where, after objection filed and proof taken, the surrogate finds that:

1. His circumstances are such that they do not afford adequate security to the creditors, or persons interested in the estate or fund for the due administration thereof.
2. He is not a resident of the state of New York.

§ 94, *Sur. Ct. A.* Former § 2564, *Code Civ. Pro.*

Supplementary letters may be issued when certain disabilities are removed. See § 156, ¶ 78.

Two classes of persons are named in this section, those who are incompetent to receive letters, and those who may be excluded unless certain conditions are complied with as provided in section 97 (¶ 105).

Persons incompetent to execute the duties of the trust.

The surrogate is authorized to withhold letters from one who, on account of any mental infirmity, is unfit to discharge the duties of the trust. Letters should not be granted to an adjudged incompetent nor to one unable by reason of incurable bodily disease, to understand the duties of a given trust sufficiently to safeguard the interests of the living. *Matter of Leland*, 219 N. Y. 387.

The standard of incompetency fixed by the written law can alone be applied in passing upon the qualifications of the applicant to whom that law has given priority. Hence, indebtedness to the estate and personal interest in its admin-

istration are not in themselves, nor are old age and physical infirmity, *per se* disqualifications for the office. The fact that a person having the right to a grant of letters claims any of the property alleged to belong to the estate is not a bar to such grant.

Formerly, either by careless wording of the law or intentionally, dishonesty was made a ground for refusing letters to an executor, but was not to an administrator. This difference does not now exist.

“ All departures in conduct from the principles of rectitude, including all abuses of trust, are unwise and inexpedient, and therefore, in a certain sense, improvident, but they do not constitute the kind of improvidence which the Legislature had in view in these enactments; a very careful, shrewd, and money-making person may be guilty of negligence or abuse in a fiduciary capacity, but such a person is not improvident in the sense of the statute. The words with which the term is associated, ‘ drunkenness,’ ‘ want of understanding,’ are of some importance in arriving at its true construction; the term evidently refers to habits of mind and conduct which become a part of the man, and render him generally and under all ordinary circumstances unfit for the trust or employment in question.” *Emerson v. Bowers*, 14 N. Y. 449, 454.

To refuse to grant letters to an executor named in a will is no light matter, and can be justified only upon the grounds stated in the Act (§ 94). Unless the case be brought within the letter and spirit of the statute the surrogate has no discretion to refuse letters. (*McGregor v. McGregor*, 1 Keyes, 133, 136.) The dishonesty contemplated by the statute must be taken to mean dishonesty in money matters from which a reasonable apprehension may be entertained that the funds of the estate would not be safe in the hands of the executor. *Matter of Latham*, 145 App. Div. 849, 130 N. Y. Supp. 535.

It is not a sufficient objection to cause the court to refuse to grant letters because the children of the executors are in-

terested as against other claimants, and that the court should prevent the executors from being placed in a situation where there are temptations to misconduct. *Matter of Bennett*, 60 Misc. Rep. 28, 112 N. Y. Supp. 592.

Improvvidence. See ¶ 107.

In order to disqualify a person under the statute, the improvidence or want of understanding must amount to a lack of intelligence. Just what is meant by the term "improvidence" as used in the statute, that is, its legal interpretation, has received considerable attention at the hands of the courts.

Speaking upon this subject in the case of *Coggshall v. Green* (9 Hun, 471), the court say: "Moral guilt or delinquency is not a ground for excluding a person from receiving letters, unless he has been convicted of an infamous crime. Improvidence such as to exclude a party from administration is a want of ordinary care and forecast in the acquisition and preservation of property. And it has been held that vicious conduct, improper and dishonest acquisition of property, and even loose habits of business, did not constitute 'improvidence' within the meaning of the statute, nor the fact that the petitioner was indebted to the estate."

In *Coope v. Lowerre* (1 Barb. Ch. 45), the chancellor said: "The fact that a man is dishonest, and seeks to obtain the possession of the property of others by theft, robbery, or fraud, is not evidence of improvidence." And in further commenting upon the subject the court says in that case: "Taking what the respondent there stated to be true, he certainly was grossly negligent in the management of his property and affairs, and in the contracting of debts, by indorsing for strangers, or for men without visible means of payment. But, after all, I cannot bring my mind to the conclusion that he is improvident to such a degree as to render him incompetent to discharge the duty of an administrator." *Matter of Greene*, 48 Misc. Rep. 31, 96 N. Y. Supp. 98.

The objection was raised among others to the applicant that he was "improvident," and it was shown that the applicant had not been able to accumulate any property or support his children and was living beyond his means and borrowing — *held* that he should not have letters. *Matter of Ferguson*, 41 Misc. Rep. 465, 84 N. Y. Supp. 1102.

The fact that a man is a professional gambler is such presumptive evidence of improvidence as to render him incompetent to discharge the duties of executor or administrator. *McMahon v. Harrison*, 6 N. Y. 443.

A conviction in another State of the crime of larceny is not conclusive evidence of improvidence. *O'Brien v. Neubert*, 3 Dem. 156.

Want of understanding.

Old age and physical infirmity do not render a person incompetent "by reason of want of understanding." *Matter of Berrien*, 3 Dem. 263; *Matter of Leland*, 219 N. Y. 387.

Drunkenness.

Disqualification on account of drunkenness only occurs when a person has habitual, continued, inveterate, and irremediable habits of drunkenness incapacitating him for the transaction of business. *Elmer v. Kechele*, 1 Redf. 472.

A person is not disqualified by drunkenness, improvidence, or want of understanding from acting as executor unless he lacks intelligence or is an habitual drunkard. *Matter of Manley*, 12 Misc. Rep. 474, 68 N. Y. St. Repr. 136, 34 N. Y. Supp. 258.

Letters not granted to a felon.

The revision omits the language, "convicted of an infamous crime," and substitutes the word, "felon." A felony is defined in the Penal Law as being a crime which is, or may be, punishable by death, or imprisonment in a State prison. Penal Law, § 2.

This change makes it unnecessary for the surrogate to determine whether an alleged crime is or is not "infamous."

Under the former section it was held:

A party who is named as executor may qualify, although he has been convicted of an infamous crime, if he has been pardoned. *Matter of Raynor*, 48 Misc. Rep. 325, 96 N. Y. Supp. 895.

A conviction for violation of the Excise Law is not a conviction for an infamous crime. *Matter of Greene*, 48 Misc. Rep. 31, 96 N. Y. Supp. 98.

Aliens.

A nonresident alien is not entitled to letters, even "contingently." *Matter of Ferrigan*, 92 App. Div. 376, 87 N. Y. Supp. 16.

An alien resident may be appointed administrator. *Tanas v. Municipal G. Co.*, 88 App. Div. 251, 84 N. Y. Supp. 1053.

Alien nonresident cannot authorize holder of his power of attorney to receive letters.

A resident acting under a power of attorney from a sole alien nonresident next of kin, can not be designated to receive letters. Such alien could not receive letters himself, and therefore could not authorize another to do what he could not do himself. *In re Ferguson*, 92 App. Div. 376, 87 N. Y. Supp. 16; *Sutton v. Public Adm.*, 4 Dem. 33.

Nonresident.

A nonresident executor is "competent by law to serve" and letters should be issued to him as of course where no objection is filed. *Matter of Demarest*, 1 Civ. Pro. R. 302; *Matter of Sterling*, 9 id. 448.

In *Estate of Emery*, 13 Civ. Pro. Rep. 365, it was said that letters ought not to be granted to a nonresident, even when no objection was made, because creditors and some other persons interested in the estate were not parties to the proceeding. But the general practice has been to issue letters to non-

residents who have not been requested to give a bond. Any other practice would nullify the language of the section and make it necessary for the surrogate to demand a bond from a nonresident in every case. A nonresident may now be required to file a designation of the clerk of the court upon whom process may be served. ¶ 105.

¶ 105 When Letters Refused; Objections to Grant of Letters; When Security Required; Official Oaths.

Surrogate may refuse letters under certain conditions.

The surrogate may, in his discretion, refuse to grant letters to any person unable to read and write the English language; or to any person who does not file in the surrogate's office an instrument acknowledged or proved, and duly certified designating the clerk of the surrogate's court and his successor in office, on whom service of any process issuing from the surrogate's court may be made in like manner and with like effect as if it were served personally upon himself, whenever the person so receiving letters can not be found and served within the state of New York, after due diligence used.

§ 95, *Sur. Ct. A.* Former § 2565, *Code Civ. Pro.*

This section provides a means of obtaining personal service on a representative who is a nonresident or who leaves the State. Requiring the filing of the designation being discretionary with the surrogate will not make its use necessary in every case, but if it is generally required few estates will be in the situation many have been in, with the representative and property gone, and no remedy.

Objections to grant of letters.

Any person interested in the estate or fund may, before letters testamentary, of administration or of guardianship are granted, or a testamentary guardian or trustee is allowed to qualify and serve, file objections showing his interest in the estate or fund, and setting forth specifically one or more legal objections to granting the letters to one or more of the persons about to receive the same, or to allowing a testamentary guardian or trustee to qualify and serve. Where such objections are filed, the surrogate must stay the granting of letters or refuse to allow the testamentary guardian or trustee to qualify until the matter is disposed of.

§ 96, *Sur. Ct. A.* Former § 2566, *Code Civ. Pro.*

Under this section any legal objection can be raised and determined. See ¶ 104.

Staying issue of letters.

When an affidavit is filed, letters should not be then issued to an executor who is not objected to. *McGregor v. Buel*, 24 N. Y. 166.

The oath of the objector that he is a creditor is enough in the first instance. *Burwell v. Shaw*, 2 Bradf. 322; distinguished in 52 Hun, 27, 22 N. Y. St. Repr. 208, 4 N. Y. Supp. 761.

Appeal from order.

An appeal may be taken from the order sustaining objections to issue of letters to executor. *Matter of Latham*, 203 N. Y. 605.

Security to be required from a trustee or executor acting as trustee.

Whenever by or pursuant to any last will and testament, or by an order of the surrogate's court, a trustee is appointed, or an executor is appointed who is required to hold, manage, or invest any money, securities or property real or personal for the benefit of another, such trustee, or executor, before receiving any such property into his possession or control shall, unless contrary to the express terms of the will, execute to the people of the state of New York, in the usual form, a bond with sufficient surety or sureties in an amount to be fixed by the surrogate. Upon any judicial settlement and partial distribution of such estate or fund the decree may provide for the discharge of the existing bond, and the filing of a new bond covering the amount still remaining in the hands of such executor or trustee.

This section shall not affect any executor or trustee named in a will executed before September first, 1914. § 169, *Sur. Ct. A.* Former § 2639, *Code Civ. Pro.*

Security from a testamentary trustee.

Security is now required from all trustees, unless contrary to the express terms of the will, or unless the will was executed before September 1, 1914, when such requirement went into effect. But any trustee who has not been required to give a bond may still be compelled to do so, in a case where an executor could be so required.

Bond by trustee named in a will executed before September 1, 1914.

Section 171 does not limit the specific provisions of § 169, and therefore a trustee named in a will executed before Sept.

1, 1914, need not give a bond. *In re Michel*, 160 N. Y. Supp. 520.

Bond on grant of letters testamentary.

On probate of a will a decree was made that letters issue to wife who had the use of the real and personal estate upon giving a bond for the value of both real and personal. Decree was reversed on that point. *In re Ughetta*, 176 App. Div. 651, 163 N. Y. Supp. 565.

Where the will provided that the executors should give a bond, but specified no conditions or forfeiture, letters issued without bond are valid. *Sandford v. Bronx Boro. Builders Co.*, 175 App. Div. 384; 161 N. Y. Supp. 975.

Substituted trustee—security waived.

Where all parties interested in a fund concerning which a substituted trustee is to be appointed, in writing waive the giving of security, the decree appointing the trustee is a valid exercise of the power vested in the surrogate. *Mulligan v. Bond & M. Guar. Co.*, 193 App. Div. 741, 184 N. Y. Supp. 429.

Bond; when required.

In either of the following cases, a person named as executor in a will, or a testamentary guardian or trustee who is not required by the will to give a bond, may entitle himself to letters or to act thereunder by giving a bond as prescribed by law, although an objection against him has been established to the satisfaction of the surrogate:

1. That his circumstances are such, that they do not afford adequate security to the creditors, or persons interested in the estate or fund, for the due administration of the same.

2. That he is not a resident of the state; and he is a citizen of the United States.

§ 97, *Sur. Ct. A.* Former § 2587, *Code Civ. Pro.*

This section applies to executors, testamentary guardians and testamentary trustees. Executors are not required in the first instance to give bonds as such, but must when they are to act as trustee. See § 169.

All testamentary trustees and guardians must give bonds, except the former shall not be required to give a bond if

named in a will executed before September 1, 1914, or the latter, if the will expressly exempts him from giving a bond. §§ 169, 188, ¶¶ 77, 100.

All nonresidents are required to give bonds, if objection be made to their serving without giving security.

Where the applicant is otherwise entitled to serve without a bond, he may be required under this section to give a bond.

In the case of the appointment of an executor it is usual to make such appointment without requiring the giving of a bond unless something arises in the nature of the case to require his giving security for the faithful performance of his official acts. *Matter of Greene*, 48 Misc. Rep. 31, 96 N. Y. Supp. 98.

Financial responsibility. See ¶¶ 104, 107.

The fact that an executor named is worth only about half as much as testator is not sufficient ground for refusal to grant letters to him. *Ballard v. Charlesworth*, 1 Dem. 501; *Martin v. Duke*, 5 Redf. 597; followed in 60 Barb. 56.

Letters not refused because of the allegation that executrix was financially irresponsible. *Matter of Ried*, 138 App. Div. 83, 122 N. Y. Supp. 600.

Trustee relieved by the will, may be required to give a bond.

The fact that one of two co-trustees is solvent is no defense when the other is asked to file security. *Matter of Sears*, 5 Dem. 497.

Breach of trust is not sufficient to authorize an order for security. The application must be based upon a cause specified in section 97, which would authorize an order for security from an executor. *Matter of Lawrence*, 6 Dem. 342.

The successor to a deceased trustee should be required to give security. *Matter of Whitehead*, 3 Dem. 227.

It is not a good reason for requiring security that the trustee's wealth is not equal to the amount of property intrusted to his care. *Matter of Weil*, 49 App. Div. 52, 63 N. Y. Supp. 688.

Sureties on a bond of a trustee which does not state that the trustee shall account, etc., but provides that the trustee shall pay over, etc., such sums as "shall come" to his hands, are not liable for failure to pay over money received prior to the making of the bond. *Thompson v. Am. Surety Co.*, 170 N. Y. 109; aff'g, 56 App. Div. 113, 67 N. Y. Supp. 564.

Official oaths of executors, etc.

The official oath or affirmation of an executor, administrator, guardian, or testamentary trustee, to the effect that he will well, faithfully, and honestly discharge the duties of his office, describing it, must be filed in the surrogate's office, before letters are issued to him, or he is permitted to act. The oath may be taken before any officer who is authorized to administer oaths.

§ 98, *Sur. Ct. A.* Former § 2568, *Code Civ. Pro.*

Provisions of Banking Law regarding issuing letters testamentary, of administration and of guardianship to trust companies and certain banks, and appointing them trustees.

Provisions relating to appointment of and exercise of powers as executor and in other fiduciary capacities.

1. **Executor.** When any trust company is appointed executor in any last will and testament, a court or officer authorized to grant letters testamentary in this state, shall, upon the proper application, grant letters testamentary thereon to such corporation or to its successor by merger.

2. **Guardian, trustee or administrator.** Any trust company may be appointed guardian, trustee or administrator, with or without the will annexed, on the application or consent of any person acting as such or entitled to such appointment and in the place and stead of such person, or such trust company may be joined with any person so acting or entitled to such appointment; but such appointment shall be made upon such notice, as is required by law, to the persons interested in the estate or fund and on the consent of such of the principal legatees or other persons interested in the estate or fund as the court, surrogate or judge making the appointment shall deem proper. No appointment so made shall be deemed to increase the number of persons entitled to full compensation beyond the number so entitled under the terms of the will or deed creating the trust or appointing a guardian or authorized by law. Whenever a person is joined with such trust company in any appointment as guardian, trustee or administrator with or without the will annexed, his appointment may be under such limitation of powers and upon such terms and conditions as to deposit of assets by such person, with such trust company, or otherwise, and upon such reduced bond or security to be given by such person, as the court, surrogate or judge, making the appointment, shall prescribe.

When application is made to any court or officer having authority to grant letters of administration with the will annexed upon the estate of any deceased

person, and there is no person entitled to such letters who is qualified, competent, willing and able to accept such administration, such court or officer may at the request of any party interested in the estate grant such letters of administration with the will annexed, to any such corporation.

Any court or officer having authority to grant letters of guardianship of any infant may upon the same application as is required by law for the appointment of a guardian for such infant, appoint any such corporation as the guardian of the estate of such infant.

* * * * *

6. Bonds. No bond or other security, except as hereinafter provided, shall be required from any such corporation for or in respect to any trust, nor when appointed executor, administrator, guardian, trustee, receiver, committee or depository or in any other fiduciary capacity. The court, or officer making such appointment may, upon proper application, require any corporation, which shall have been so appointed, to give such security as to the court or officer shall seem proper, or upon failure of such corporation to give security as required, may remove such corporation from and revoke such appointment.

§ 188, *subds. 1, 2, 6, Banking Law.*

Consent of trust company to act.

Since a trust company is not required to file an oath or bond, there should be some evidence before the court that the trust company consents to act as executor, administrator, guardian or trustee.

It is therefore good practice to require the trust company to file in court a duly acknowledged consent to so act, which consent will be authority for the Surrogate's Court to issue letters, and will show that the trust company has entered or will at once enter upon the discharge of its duties. It is often important to hold the executor, administrator or guardian to a prompt performance of his duty, for delay may mean a loss to the estate or fund.

Appointment of banking or trust company; official oath not required.

Upon the appointment of such trust company as such executor, administrator, guardian, trustee, receiver or committee, no official oath shall be required.

§ 188, *subd. 10, Banking Law.*

Special authorization to banks to exercise fiduciary powers.

The superintendent may by special authorization grant banks applying therefor the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or in any other fiduciary capacity in which trust companies are permitted to act.

§ 24 A, *Banking Law.*

CHAPTER XXVII.

Revocation of Letters, How and When Revoked. Removal of Testamentary Trustee.

- ¶ 106. § 99. Revocation of letters for disqualification and misconduct.
- § 100. Petition and citation.
Suspension of respondent.
- ¶ 107. § 100. Hearing and decree.
Testamentary trusts not affected.
- ¶ 108. Removal of testamentary trustee and guardian.
Removal by supreme court.
§ 85. Effect and contents of decree revoking letters.
§ 86. Liability not affected.
- ¶ 109. § 102. Resignation, proceeding for.
§ 103. Proceedings thereupon.
- ¶ 110. § 104. Revocation, or removal without citation.
§ 154. Revoked by decree on probate.

¶ 106 Removal or Revocation of Letters for Misconduct; Petition and Citation.

Removal, or revocation of letters for disqualification, misconduct, etc.

In either of the following cases, a creditor, or person interested in the estate of a decedent, or a ward or friend of a ward, or a person beneficially interested in the execution of a trust, or any surety on a bond of a person to whom letters have been granted or of a trustee may present to the surrogate's court having jurisdiction a petition, praying for a decree revoking those letters, or removing such trustee, and that the respondent may be cited to show cause why a decree should not be made accordingly:

1. Where the respondent was, when appointed or when letters were issued to him, or has since become incompetent, or disqualified by law to act as such, and the grounds of the objection did not exist, or the objection was not taken by the petitioner, or a person whom he represents, before the letters were granted or the appointment made.

2. Where, by reason of his having wasted or improperly applied the money or other assets in his hands, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge; or by reason of other misconduct in the execution of his office, or dishonesty, drunkenness, improvidence, or want of understanding; he is unfit for the due execution of his office.

3. Where he has wilfully refused, or, without good cause, neglected, to obey any lawful direction of the surrogate contained in a decree or order, or any provision of law relating to the discharge of his duty.

4. Where the grant of his letters, or his appointment was obtained by a false suggestion of a material fact.

5. Where by the terms of a will, deed or order his office was to cease upon a contingency which has happened.

6. In the case of an executor, who has not been required to give a bond, where his circumstances are such that they do not afford adequate security to the creditors or persons interested for the due administration of the estate; or where he has removed or is about to remove from the state.

7. In case of a guardian where he has removed or is about to remove from the state, or where the interest of the infant will be promoted by the appointment of another person as guardian.

8. In the case of a temporary administrator, appointed upon the estate of an absentee, where it is shown that the absentee has returned; or that he is living, and capable of returning and resuming the management of his affairs; or that an executor, or administrator-in-chief has been appointed upon his estate; or that a committee of his property has been appointed by a competent court of the state.

§ 99, *Sur. Ct. A.* Former § 2569, *Code Civ. Pro.*

False suggestion.

In some cases it has been held that a statement in a petition for administration made by the widow that the deceased left no next of kin is not material, but where it is so made by a person not the widow, who knows that the deceased had next of kin who were entitled to share in the estate, it is material, and for that and other good causes the letters should be revoked. *In re Grover*, — App. Div. —, 164 N. Y. Supp. 209.

There is a false suggestion of a material fact when it is represented that there are assets unadministered. *Matter of Rathyen*, 115 App. Div. 644, 101 N. Y. Supp. 289.

There is no false suggestion of a material fact when the age of the deceased is not correctly stated or the amount of his property. *Matter of Campbell*, 56 Misc. Rep. 229.

Revoking letters issued to consul.

Where the estate had been fully administered and judicial settlement was in progress, the surrogate refused to revoke the letters of the consul. *In re Baldassarro*, 156 N. Y. Supp. 175, 92 Misc. Rep. 627.

After letters were issued to a consul upon the estate of a

subject of his country, the widow came to this country to reside, and made application for revocation. The surrogate denied the application, citing *Matter of McDonald*, 211 N. Y. 272. He, however, required the consul to file security.

Citation must be issued.

Letters cannot be revoked under this section upon an *ex parte* application without citation. *Matter of Engelbrecht*, 15 App. Div. 541, 44 N. Y. Supp. 551, 78 N. Y. St. Repr. 551.

Who may present the petition.

A receiver in supplementary proceedings where the judgment debtor is a person interested, may petition for the removal. *Matter of Kennedy*, 143 App. Div. 839, 128 N. Y. Supp. 626.

A natural guardian of a minor is not a party interested who can apply for the revocation of the letters of an executor. *Quin v. Hill*, 6 Dem. 39, 19 N. Y. St. Repr. 830.

Where it appears that a petitioner has assigned her interest in the estate, the petition will be dismissed upon a claim of fraud in its execution. *Woodruff v. Woodruff*, 3 Dem. 505.

A person who has become a creditor since the issue of letters has no standing in court to cause them to be revoked. *Matter of Ciotto*, 105 App. Div. 143.

Where the surviving partner and the executor of a deceased partner continue the firm business, a creditor of such firm is not a creditor of the estate who can maintain a proceeding to revoke the executor's letters. *Matter of Stern*, 29 N. Y. St. Repr. 216, 9 N. Y. Supp. 445.

A debtor to the estate is not a person interested so as to entitle him to institute proceedings for revocation of letters. *Drexel v. Berney*, 1 Dem. 163, 3 Civ. Pro. Rep. 122.

The proceeding cannot be maintained unless the executor has qualified. *Matter of Richardson*, 8 Misc. Rep. 140, 59 N. Y. St. Repr. 483, 29 N. Y. Supp. 1079.

One executor may maintain the proceeding against the

other. *Hassey v. Keller*, 1 Dem. 577; *Sperb v. McCoun*, 110 N. Y. 605.

A son interested in the remainder died leaving children — held that they were persons interested who could maintain the proceeding. *Matter of Petrie*, 5 Dem. 352, 7 N. Y. St. Repr. 718.

Petition; citation thereupon; suspension.

A petition presented as prescribed in the last section, must set forth the facts showing that the case is one of those therein specified, and unless the surrogate declines to entertain the proceeding, a citation must be issued according to the prayer thereof.

If such citation be issued the surrogate may, in his discretion, make an order suspending the respondent wholly or partly, from the exercise of his powers and authority, during the pendency of the special proceeding. A certified copy of an order so made must accompany the citation, and be served therewith; but, from the time when it is made, the order is binding upon the respondent and upon all other persons, without service thereof, subject to the exceptions and limitations prescribed in sections 85 and 86 of this act, with respect to a decree revoking letters.

§ 100, *Sur. Ct. A.* Former § 2570, *Code Civ. Pro.*

No proof other than the petition need be presented to obtain a citation. Under the former section such additional proof was necessary. See *Moorhouse v. Hutchinson*, 15 App. Div. 541, 44 N. Y. Supp. 551, 78 N. Y. St. Repr. 551; *Matter of Dittrich*, 120 App. Div. 504.

Sections 85 and 86 referred to are found in ¶ 108.

Petition and citation.

The petition should not following the language of the section simply, but should state the facts which warrant the conclusion. *In re Chauncey*, 101 Misc. Rep. 275, 166 N. Y. Supp. 949; *Matter of Plumb*, 21 N. Y. St. Repr. 107, 4 N. Y. Supp. 135.

The inquiry which the surrogate must make is left to his discretion. *Matter of Plumb*, 21 N. Y. St. Repr. 107.

A guardian, although declared to be insane, must be served with citation upon an application for the removal of such guardian. *Damarell v. Walker*, 2 Redf. 198.

Objections.

Objection that the circumstances of a person named as executor do not afford adequate security should be made before letters are issued.

After letters are issued, that objection is available only on an application to remove an executor under subd. 6 of § 99. *In re Chauncey*, 101 Misc. Rep. 275, 166 N. Y. Supp. 949.

¶ 107 Hearing; When Decree Will be Made.**Hearing; decree; testamentary trusts not affected.**

Upon the return of a citation, issued as prescribed in the last section, the surrogate may make a decree revoking the letters issued to, or removing, the respondent, or may, in his discretion, dismiss the proceedings upon such terms as justice requires.

Where an executor or an administrator is also a testamentary trustee, a decree revoking his letters does not affect his power or authority as testamentary trustee, except in the case specially prescribed for that purpose, in section 170 of this act. § 101, *Sur. Ct. A.* Former § 2571, *Code Civ. Pro.*

The surrogate may use his discretion as to revoking letters. Often parties may have the right to have letters revoked, but, for instance, if a nonresident has not been cited on administration, it might not be for the interest of the estate to revoke them. Under the general power given, the surrogate may require a bond. *Matter of Engel*, 155 App. Div. 467, 140 N. Y. Supp. 286.

Discretion of surrogate.

Section 170 referred to is found in ¶ 79.

The language greatly enlarges this discretion, since it provides that the surrogate “ may ” not “ must ” make a decree.

Proof required.

The proof must be competent and legal proof, and an affidavit upon information and belief is not sufficient. *Matter of Owsley*, 153 App. Div. 90, 137 N. Y. Supp. 1040.

This proceeding is a special proceeding determinable, not as a motion upon affidavits, but upon evidence. *Matter of*

Welch, 61 Misc. Rep. 5, 114 N. Y. Supp. 620; *Matter of McGoughran*, 124 App. Div. 312, 108 N. Y. Supp. 934.

Burden of proof.

A person asking for removal of executors on the ground of dereliction of duty must prove facts showing the truth of the allegation. *Freeman v. Kellogg*, 4 Redf. 218.

The burden of showing illegitimacy rests upon the persons alleging it. *Matter of Kelly*, 46 Misc. Rep. 541, 95 N. Y. Supp. 57.

Decision; reference.

A reference may be ordered under section 66 (See ¶ 15), to obtain needed information on question of fact involved. *Matter of Hale*, 45 App. Div. 578, 61 N. Y. Supp. 596.

The surrogate should make his decision as upon a regular trial. See § 71 (¶ 32).

Jurisdiction.

Surrogate has exclusive jurisdiction to revoke letters testamentary. *Hood v. Hood*, 2 Dem. 583.

Upon application to revoke letters of administration surrogate may inquire into jurisdiction of court of another State which attempted to grant decree of divorce. *Kerr v. Kerr*, 41 N. Y. 272.

The surrogate has power to construe a will where it is necessary to do so in order to determine an application for the removal of executors. *Matter of Fernbacker*, 8 Civ. Pro. Rep. 308.

Surrogate may determine whether petitioner is a creditor. *Matter of Gillingham (Wheeler)*, 46 Hun, 64, 10 N. Y. St. Repr. 864.

On a proceeding to remove an executor, the question as to whether certain property belonged to the deceased at death may be decided, although it must follow that if it did not, it must have belonged to the executor. *Matter of Welch*, 61 Misc. Rep. 5, 114 N. Y. Supp. 620.

EFFECT AND PROOF OF MARRIAGE, DIVORCE and other domestic conditions affecting revocation of letters may be found at ¶ 23.

Effect of separation of officers of executor and trustee.

Where the office of trustee and executor are vested in the same person, and a separation occurs, the executor has no title to or interest in the fund given to the trustee. *Windsor Trust Co. v. Waterbury*, 145 N. Y. Supp. 794.

Hearing and decree. See ¶ 104.

The surrogate may of his own motion require the representative to account. *Matter of Kennedy*, 143 App. Div. 839, 128 N. Y. Supp. 626.

A representative will not be removed as a punishment to him, but only for the protection of the estate.

Where unauthorized investments have been made or other technical violations of the rules governing the conduct of trustees have been committed, the surrogate should not for those reasons remove him, if no loss has resulted to the estate and he has accounted for and paid over all money with which he is chargeable. *Matter of Burr*, 118 App. Div. 485, 104 N. Y. Supp. 29.

Where a person who receives letters is a debtor to the estate, such indebtedness represents so much money in his hands, and he cannot change that situation and liability by resigning and turning the evidence of such indebtedness over to a successor. *Matter of Ablowich*, 118 App. Div. 626, 103 N. Y. Supp. 699.

Allegations that an executor claims a large part of the estate as his against the contention of others interested, does not authorize the removal of the executor even though such allegations were true. *In re Drummond*, 100 Misc. Rep. 78, 165 N. Y. Supp. 78.

Dishonesty.

Dishonesty was given as a ground for revoking letters of

administration, where the persons appointed had before the appointment secured the estate of their feeble mother for the purpose of preventing a sister from sharing therein. *Matter of Kirchner*, 89 Misc. Rep. 717.

Lack of property. See ¶ 105.

The fact that an executor has less property than the testator is not ground for revoking his letters. *Grubb v. Hamilton*, 2 Dem. 414, following 5 Redf. 600.

Objections that the circumstances of a widow who had no separate estate did not furnish adequate security for the due administration of the estate overruled. *Matter of McLean*, 1 Dem. 396.

Improvvidence defined. See ¶ 104.

Where the representative has become drunken, improvident, and insolvent he will be removed. *Matter of Cady*, 36 Hun, 122; aff'd, 103 N. Y. 678; *Emerson v. Bowers*, 14 N. Y. 449.

Illiterate.

Letters of coexecutors will not be revoked because of only slight knowledge of English language. *Hassey v. Keller*, 1 Dem. 577.

Removal from state; nonresidence.

Temporary removal from the State does not make it necessary for the surrogate to remove executors. *Matter of McKnight*, 80 App. Div. 284; aff'd, 179 N. Y. 522.

It was formerly held, *Matter of Sterling*, 9 Civ. Pro. Rep. 448, that an executor who was a nonresident when he qualified, could not thereafter be removed on the ground of nonresidence. It is now provided in subdivision 6 of section 99 that such removal or intention to remove from the State is sufficient ground for making the application, and the surrogate may exercise his discretion as to whether the interest of the estate requires his removal.

Interested party.

A temporary administrator who is the executor and is interested will not be removed for such reasons. *Matter of Ashmore*, 48 Misc. Rep. 312, 96 N. Y. Supp. 772.

Disqualified.

Where letters have been issued to a creditor without citing a nonresident prior entitled, upon an application by such nonresident for revocation of such letters the creditor becomes "disqualified" and the letters to him may be revoked. *Matter of Tyers*, 41 Misc. Rep. 378, 84 N. Y. Supp. 934.

Letters of administration will be revoked where the original application did not state the fact that letters had been granted in another State, and notice was not given to an interested next of kin. *In re Worthling*, 169 N. Y. Supp. 877.

A coexecutor who was occupying a house owned by the estate refused to join in a deed of the same when an advantageous sale could be made — *held* that he should be removed from office. *Oliver v. Frisbee*, 3 Dem. 22.

An executor will not be removed because he refuses to act in the presence of the personal attorney of a coexecutor. *Matter of Waterman*, 112 App. Div. 313, 98 N. Y. Supp. 583.

Mere fact that the executor has borrowed the estate money is not sufficient to cause his removal. *Matter of Petrie*, 5 Dem. 352, 7 N. Y. St. Repr. 718.

An executor being required to give a bond, made over to his sureties some of the estate property to indemnify them — *held* ground for the revocation of his letters. *Fleet v. Simmons*, 3 Dem. 542.

The surrogate may exercise his discretion upon the whole case, and a wise discretion will not be disturbed upon appeal. *Matter of Rettig*, 88 Hun, 301, 68 N. Y. St. Repr. 264, 34 N. Y. Supp. 341; *Matter of West*, 40 Hun, 291; *aff'd* 111 N. Y. 687.

An executor will be removed where he has paid over to the life beneficiary a fund knowing that she intended to misappropriate it. *Matter of Fernbacker*, 8 Civ. Pro. Rep. 308.

Where the conduct of the representative is greatly to the prejudice of the estate, he may be removed. *Matter of Wheaton*, 37 Misc. Rep. 184, 74 N. Y. Supp. 938; *Quackenboss v. Southwick*, 41 N. Y. 117; *Oliver v. Frisbie*, 3 Dem. 22.

Transactions with real estate.

An executor authorized to invest on bond and mortgage, who buys real estate and loses a part of the investment, wastes and imprudently manages the funds, should be removed. *Hood v. Hood*, 2 Dem. 583.

Where the representative in bad faith and with gross negligence has withheld land from sale, until it has depreciated in value, he has just as completely wasted assets as if he had willfully destroyed them or negligently permitted their injury. *Haight v. Brisbin*, 100 N. Y. 219; revg. 36 Hun, 579.

An administrator as such has no authority or control over the real estate of his intestate and assumes no obligations in reference to it, and owes no duty to the heirs; he is not, therefore, precluded from purchasing such real estate at a foreclosure sale, and such purchase is not ground for his removal from office. *Matter of Monroe*, 142 N. Y. 484.

Where the petition and citation in a proceeding to remove a coexecutor for failure to act required him to show cause why he should not so act, or be removed, the decree should also be in the alternative. *In re Hayes*, 158 N. Y. Supp. 527, — App. Div. —.

¶ 108 Removal of Testamentary Trustee and Guardian; Effect and Contents of Decree.

Removal of testamentary trustee.

The section requires practically the same causes for the removal of a trustee as for the removal of an executor. The Supreme Court may also remove a testamentary trustee. See § 162, Real Property Law.

Parties.

The only party necessary to be cited is the trustee. *Matter of Sterling*, 68 Misc. Rep. 3, 124 N. Y. Supp. 894.

The section applied.

A testamentary trustee derives his authority from the will, and whatever authority or show of authority the will gives him may be extinguished by the surrogate and, therefore, such trustee may be removed although he has never in fact acted as such. *Matter of Burk*, 1 N. Y. St. Repr. 316; *S. C.*, *Matter of Gilbert*, 3 id. 208; *Lane v. Lewis*, 4 Dem. 468.

Where a trustee is insolvent he cannot be removed until he has failed to give security required by an order. *Morgan v. Morgan*, 3 Dem. 612.

“The power of removal of trustees appointed by deed or will ought to be exercised sparingly by the court.” *Elias v. Schweyer*, 13 App. Div. 336, 340; *Matter of Seymour's Estate*, 42 N. Y. St. Repr. 154, 17 N. Y. Supp. 91.

When the evidence shows that any of the causes for removal exist, it is within the discretion of the surrogate to remove the trustee. In this case the trustee had conducted unnecessary litigation against the beneficiary. *Matter of McGillivray*, 138 N. Y. 308.

Where the representative in bad faith and with gross negligence has withheld land from sale, until it has depreciated in value, he has just as completely wasted assets as if he had willfully destroyed them or negligently permitted their injury. *Haight v. Brisbin*, 100 N. Y. 219; revg. 36 Hun, 579.

Where the representative has become drunken, improvident, and insolvent, he will be removed. *Matter of Cady*, 36 Hun, 122; aff'd, 103 N. Y. 678.

In cases of actual trusteeship removal of a trustee may be made on account of personal reasons, that the trustee is obnoxious to the persons interested, but this rule does not apply to the case of executors sought to be removed for such reason. *Trask v. Sturges*, 31 Misc. Rep. 195, 63 N. Y. Supp.

1084; aff'd, 56 App. Div. 625, 68 N. Y. Supp. 1149; aff'd, 170 N. Y. 482.

Removal of adjudged lunatic.

Where a trustee becomes a lunatic it is not the same as death. He is still one of the trustees of said estate, and immediately upon his becoming a lunatic, it is the duty of his cotrustees to make application (Real Property Law, § 112) for his removal and for the appointment of another trustee in his stead. *Bascom v. Weed*, 53 Misc. Rep. 499, 105 N. Y. Supp. 459.

Allowances. See ¶ 144.

In settling the accounts of a trustee upon his removal or resignation, the surrogate may direct proper allowances and payments to be made from the principal of the fund. *Conant v. Wright*, 19 Misc. Rep. 321, 44 N. Y. Supp. 727; aff'd, 22 App. Div. 216, 48 N. Y. Supp. 422; aff'd, 162 N. Y. 635.

Removal by supreme court.

The Supreme Court has also power to remove a testamentary trustee for similar causes, or for any other cause which seems to it sufficient. Real Prop. Law, § 112. It will, however, not accept jurisdiction unless it appears that adequate relief cannot be given by the Surrogate's Court. *Pyle v. Pyle*, 137 App. Div. 568, 122 N. Y. Supp. 256; aff'd, 199 N. Y. 538.

Motion at special term to remove trustees.

Where an application by petition is opposed, the issues are primarily triable by affidavit. It is unquestionably within the power of the Special Term to order a reference to enlighten its own conscience; but references upon the disposition of motions are not encouraged, and are not to be resorted to save in "exceptional cases where the facts are complicated, and it is manifest that the truth cannot be ascertained with reasonable certainty without an examination of the wit-

nesses.” (*Weinberger v. Metropolitan Traction Co.*, 63 App. Div. 240, 242; *Buchhold v. Florida East Coast R. Co.*, 59 id. 566; *Matter of Hanlein*, 65 id. 159.) Whether in a given case a reference should be had or not is something which appeals very largely to the discretion of the court when governed by the rule above cited. *Matter of Warren*, 125 App. Div. 169, 109 N. Y. Supp. 204.

Revocation of letters and removal of guardian.

Section 193 also provides for the removal of a guardian who fails to file an annual account, in a proceeding under that section.

Mere neglect to file annual account when no order to do so has been made and disobeyed is not sufficient to require a revocation of letters. *Ledwith v. Union Trust Co.*, 2 Dem. 439.

Letters revoked where the guardian was a strong Protestant and the father of the infant had been a Catholic, and the infant's near relatives were Catholics. *Matter of McConnon*, 60 Misc. Rep. 22, 112 N. Y. Supp. 590.

Revocation upon request of infant.

A father who seeks to have letters of guardianship of his child revoked must show that such revocation would be for the best interests of the infant. *In re Guston*, 220 N. Y. 373.

Under the former practice providing that an infant over fourteen years of age might apply for the appointment of a new guardian where a temporary guardian had been appointed, the court adhered strictly to the rule that no change of guardian should be allowed prior to that time unless for very unusual good cause shown. Now there being no distinction between temporary and general guardian, and the infant being given no special right to change his guardian on arriving at fourteen, the court should adopt a more liberal rule as to making such a change. By subdivision 7 of § 99 an infant is given the right at any time to apply for the appoint-

ment of another person as his guardian when his interests will be promoted by such change, and when such facts are shown, the application should be granted.

The interests of the infant should control, and where the application is not made in the interest of the infant it will be denied. *Matter of Twichell*, 117 App. Div. 301, 102 N. Y. Supp. 163.

Removal of testamentary guardian.

A testamentary guardian may be removed for any of the reasons applicable to him which are specified in section 99 (¶ 106), and the surrogate's authority is not restricted as it was before the amendments of 1914 when the case of *Mackay v. Fullerton*, 4 Dem. 153, was decided.

The Supreme Court has authority to remove a testamentary guardian in a proper case. *Matter of King*, 42 Hun, 607, 4 N. Y. St. Repr. 570.

Effect and contents of decree revoking letters.

Concerning the decree which may or should be made, sections 85 and 86 apply and should be consulted. They read as follows:

Effect and contents of decree revoking letters.

Upon the entry of a decree, made as prescribed in this act, revoking letters issued by a surrogate's court to an executor, administrator or guardian, his powers cease. The decree may, in the discretion of the surrogate, require him to account for all money and other property received by him; and to pay and deliver over all money and other property in his hands into the surrogate's court, or to his successor in office, or to such other person as is authorized by law to receive the same; or it may be made without prejudice to an action or special proceeding for that purpose, then pending, or thereafter to be brought. The revocation does not affect the validity of any act, within the powers conferred by law upon the executor, administrator, or guardian, done by him before the service of the citation, where the other party acted in good faith; or done after the service of the citation, and before entry of the decree, where his powers with respect thereto were not suspended by service of the citation, or where the surrogate, in a case prescribed by law, permitted him to do the same, notwithstanding the pendency of the special proceeding against him; and he is not liable for such an act done by him in good faith.

§ 85, *Sur. Ct. A.* Former § 2555, *Code Civ. Pro.*

The last section qualified.

The last section does not affect the liability of a person to whom money or other property has been paid or delivered, as husband, wife, next of kin, or legatee, to respond to the person lawfully entitled thereto, where letters are revoked, because a supposed decedent is living; or because a will is discovered, after administration has been granted in a case of supposed intestacy, or revoking a prior will upon which letters were granted.

§ 86, *Sur. Ct. A.* Former § 2556, *Code Civ. Pro.*

Where letters are revoked during the progress of an accounting the surrogate retains jurisdiction to continue the proceeding to final decree, but a new administrator should be appointed to represent the estate. *Casoni v. Jerome*, 58 N. Y. 315.

Accounting by the executor of a guardian after the ward became of age — *held* that the money or property ought to be paid into Surrogate's Court and not to the ward direct. *Hicks v. Townsend*, 54 App. Div. 582, 66 N. Y. Supp. 1028; *revd.* on another point 170 N. Y. 195.

The decree may be enforced by a coadministrator. *Sperb v. McCoun*, 110 N. Y. 605.

Where no property remained, no decree was made directing payment over. *Peck v. Sherwood*, 5 Redf. 416.

Where application is made to revoke letters testamentary and is denied, the surrogate may require as a condition that the executor file a bond. *Matter of Wischmann*, 80 App. Div. 520, 80 N. Y. Supp. 789.

This case seems to overrule *Matter of Magoun*, 41 Misc. Rep. 352, where the contrary was held.

Where a decree was made that if a nonresident executor failed to file a bond within twenty days it was "ordered that the letters testamentary be revoked and annulled," it was held, an appeal having been perfected, that no further order revoking the letters should be made. *Halsey v. Halsey*, 3 Dem. 196.

Interest.

The amount decreed to be paid over becomes due at once

and interest begins from date of decree. *Hood v. Hayward*, 48 Hun, 330, 15 N. Y. St. Repr. 846.

Decree binds parties upon judicial settlement.

Where an application to revoke letters made by an alleged widow was denied by a decree determining that she was not the legal widow of the deceased, such decree is binding upon her on judicial settlement and the same question cannot be again litigated. *Matter of McGoughran*, 124 App. Div. 312, 108 N. Y. Supp. 934.

Decree may direct deposit of securities.

A new section has been enacted to obviate an injustice and sometimes a loss to the estate or fund, which has heretofore occurred.

Under the former practice a decree which revoked letters on account of improper investments having been made, or other like wrongful acts as to investments, directed the persons guilty, to pay in the money, and allowed him to retain the property or securities. It sometimes happened, by the dishonesty of the executors or trustees, that he got the unlawful investments, which perhaps were worth their face value, and the estate or fund got the decree against him, upon which nothing could be realized.

To remedy this condition, the new section, which follows, provides that the decree shall direct the deposit of such property as is on hand, so that if necessary it may be disposed of and the proceeds applied to the satisfaction of the decree.

Deposit of securities may be ordered on revocation of letters.

When, upon the revocation of the letters of an executor, administrator or guardian, or the removal of a testamentary trustee, a decree shall be made in which such executor, administrator, guardian or testamentary trustee is personally charged with or directed to pay a sum of money upon a finding that he has made an unlawful investment or disposition of the estate or fund in his hands, and the security or other instrument by which such investment or disposition is evidenced, or the property in the purchase of which such investment or disposition has been made, shall not be a part of the assets which his successor may be legally required to receive, the decree shall direct that such

security or other instrument, or such property, if practicably capable of delivery under such direction, be forthwith deposited with a safe deposit company, authorized by law to do business as such, in such manner as to prevent the withdrawal of the same except upon the order of the surrogate.

§ 230, *Sur. Ct. A.* Former § 2700, *Code Civ. Pro.*

Costs.

Costs cannot be allowed to both parties payable from the estate. *Matter of Engelbrecht*, 15 App. Div. 541, 44 N. Y. Supp. 551.

¶ 109 Application for Permission to Resign.

Application by executor, etc., for permission to resign.

An executor, administrator, guardian or testamentary trustee may, at any time, present to the surrogate's court a petition, praying that his account may be judicially settled; that a decree may thereupon be made, revoking his letters or permitting him to resign, and discharging him accordingly; and that the same persons may be cited to show cause why such a decree should not be made who must be cited upon a petition for a judicial settlement of his account. The petition must set forth the facts upon which the application is founded; and it must, in all other respects, conform to a petition praying for a judicial settlement of his account. The surrogate may, in his discretion, entertain or decline to entertain the application.

§ 102, *Sur. Ct. A.* Former § 2572, *Code Civ. Pro.*

The application.

Under the former section it was held that the application should not be for leave to resign but to have letters revoked. *Matter of Curtiss*, 15 Misc. Rep. 545, 37 N. Y. Supp. 586, 73 N. Y. St. Repr. 124; aff'd, 9 App. Div. 285, 41 N. Y. Supp. 1111.

The present section authorizes an application for permission to resign.

Whether a temporary administrator can apply for revocation of his letters is questioned. *Bible Society v. Oakley*, 4 Dem. 450.

But since that case was decided a temporary administrator has been treated in many ways as an "administrator" and should have greater rights accorded to him than he had when he was regarded as a mere collector.

Sufficient reason.

A statement in the will may be considered as bearing upon the sufficiency of the reason for asking revocation of letters. *Tilden v. Fiske*, 4 Dem. 357.

A surviving partner between whom and the estate a settlement would be required not considered to have sufficient reason for revocation of letters. *Becker v. Lawton*, 4 Dem. 341.

Where the beneficiaries interested object to revocation, good reason must be apparent. *Baier v. Baier*, 4 Dem. 162.

Effect of decree.

After obtaining revocation of his own letters such person has no further right or privilege under the appointment in the will. *Matter of Suarez*, 3 Dem. 164.

Proceedings thereupon.

If the surrogate entertains an application, made as prescribed in the last section, the proceedings thereupon must be the same as upon a petition for a judicial settlement of the petitioner's account; except that the surrogate must first determine whether sufficient reasons exist for granting the prayer of the petition. Upon his fully accounting, and paying over all money which is found to be due from him, and delivering over all books, papers, and other property in his hands, either into the surrogate's court, or in such a manner as the surrogate directs, a decree may be made, revoking the petitioner's letters, or removing him, and discharging him accordingly.

§ 103, *Sur. Ct. A.* Former § 2573, *Code Civ. Pro.*

Petition.

Guardian may present petition praying that his account may be settled; that all interested persons may be cited; that his letters may be revoked.

The surrogate may in his discretion entertain or decline to entertain the application.

NOTICE of application may be given to any other person whose presence is desired by the surrogate in such manner as the surrogate deems proper.

Hearing.

Any person may appear and contest the application in the interest of the ward.

Special guardian for the infant must be appointed.

The surrogate must first determine whether sufficient reasons exist for granting the prayer of the petition, and whether the interests of the infant will be prejudiced by the resignation of the guardian.

AN ORDER may be made determining that sufficient reason exists for granting the prayer of the petition and directing an accounting.

Accounting.

Upon his fully accounting and paying all money which is found to be due from him to the ward and delivering all books, papers, and other property of the ward in his hands, either into the Surrogate's Court or in such manner as the surrogate directs,

A DECREE may be made revoking the petitioner's letters and discharging him accordingly.

This decree, on account of the requirement in section 102 that all persons who would be required to be cited on a petition for judicial settlement should be cited, becomes conclusive against all parties, and the decision in the *Matter of Tyndall*, 48 Misc. Rep. 39, that such decree is not binding upon the successor is no longer applicable.

Proceeding by trustee for leave to resign. § 102.

As a condition of allowing a resignation, the surrogate may require the trustee to waive commissions. *Matter of Curtiss*, 15 Misc. Rep. 545, 73 N. Y. St. Repr. 124; aff'd, 9 App. Div. 285, 41 N. Y. Supp. 1111.

Where litigation is pending by or against the trustee, he should not be permitted to resign. *Matter of Olmstead*, 24 App. Div. 190, 49 N. Y. Supp. 104.

Upon allowing a resignation the trustee should not be permitted to retain any of the trust estate in his hands. *Matter of Olmstead*, 24 App. Div. 190, 49 N. Y. Supp. 104.

Sufficient reason found for allowing resignation where trus-

tee was about to remove from the United States. *Tilden v. Fiske*, 4 Dem. 357.

The fact that the trustee is too busy with his own affairs is not a sufficient reason. *Baier v. Baier*, 4 Dem. 162.

¶ 110 In What Cases Letters Will be Revoked Without Citation.

In what cases letters may be revoked or trustee removed without a citation.

In either of the following cases, the surrogate may make a decree revoking letters testamentary, of administration or of guardianship, issued from his court, or removing a testamentary trustee, without a petition or the issuing of a citation:

1. Where the executor, administrator, guardian or trustee is not a resident of the state, or is absent therefrom, and upon being duly cited to account, neglects to appear upon the return of the citation, without showing a satisfactory excuse therefor, and the surrogate has not sufficient reason to believe that such an excuse can be made.

2. Where a citation or order issued to such a person, in a case prescribed by law, cannot be personally served upon him, by reason of his having absconded or concealed himself.

3. Where, by reason of his default in returning an inventory, or his neglect or refusal to obey an order, such a person has remained, for thirty days, committed to jail.

4. Where by the judgment of another court of competent jurisdiction the will under which letters have been issued is declared to be invalid.

5. Where an executor or administrator has failed to give the bond required to sell real estate, or to give a new bond, or a new surety when required to do so by an order or decree of the surrogate's court.

6. Where such person has been convicted of a felony.

7. Where such executor, administrator, guardian or trustee mingles the funds of such estate with his own or deposits the same with any person, association or corporation authorized to do business under the banking law, in an account other than as such executor, administrator, guardian or trustee.

§ 104, *Sur. Ct. A.* Former § 2574, *Code Civ. Pro.*

In 1916 subdivision 7 was added to section 2574 making a new cause for revoking letters without citation. This was done for the purpose of making effective a new section (§ 2664-a, now § 231, *Sur. Ct. A.*) added that year requiring all trust funds to be deposited in a bank account separate from the personal account of the executor, administrator, guardian or testamentary trustee.

Section 154 following contains a somewhat similar provision as subdivision 4 of the foregoing section.

Revocation of letters upon proof of will.

Where, after letters of administration, on the ground of intestacy, have been granted, a will is admitted to probate, and letters are issued thereupon; or where, a subsequent will is admitted to probate and letters are issued thereupon; the decree, granting probate, must revoke the former letters.

§ 154, *Sur. Ct. A.* Former § 2624, *Code Civ. Pro.*

This section applies to letters issued to temporary administrator. *Matter of Eisner*, 5 Dem. 383, 8 N. Y. St. Repr. 748.

Applied generally.

Where an executor has absconded and is a fugitive from justice, his letters may be revoked without issue of citation. *Sutherland v. St. Lawrence Co.*, 42 Misc. Rep. 38, 85 N. Y. Supp. 696.

Effect of revocation of letters in computing time in which an act shall be done, see § 92, ¶ 103.

Decree may direct delivery of property.

It is often necessary for the preservation of the property or fund that the court should direct that it be delivered to a successor, or to the court, when letters have been revoked or a trustee removed.

The said court has also jurisdiction when an executor, administrator, trustee or guardian has died, absconded, been removed, or become insane to direct the person so removed, or any person or corporation having possession or control of any property belonging to such estate or fund, to deliver the same to the court or to a successor duly appointed; or as directed by a decree made pursuant to section 257. See § 256.

Money held by executors, administrators, guardians and testamentary trustees must not be deposited in personal bank account.

The Legislature has made an effort to stop the mingling of

moneys held by executors, administrators, guardians and trustees with their private and personal funds, by adding section 231 requiring all such funds to be kept in a separate bank account. To enforce this requirement two penalties have been fixed:

(a) Removal from office by summary proceeding without citation. Section 104, subd. 7.

(b) Making a violation of the provisions of section 231 a misdemeanor.

Funds of estates to be kept separate.

Every executor, administrator, guardian or testamentary trustee shall keep the funds and property received from the estate of any deceased person separate and distinct from his own personal fund and property. He shall not invest the same or deposit the same with any person, association or corporation doing business under the banking law or other person or institution, in his own name, but all transactions had and done by him shall be in his name as such executor, administrator, guardian or testamentary trustee.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

§ 231, *Sur. Ct. A.* Former § 2664a, *Code Civ. Pro.*

CHAPTER XXVIII.

Grant and Issue of Ancillary Letters Testamentary and of Administration. Rights, Powers and Duties Thereunder. Right of Foreign Representative to Sue and be Sued Without Such Letters.

- ¶ 111. § 159. Ancillary letters upon foreign probate.
- § 160. Upon foreign grant of administration.
- ¶ 112. § 161. To whom ancillary letters granted.
- § 162. Petition and citation.
- ¶ 113. § 163. Hearing, decree, security.
- ¶ 114. § 164. Transmitting assets.
- § 165. Payment under decree.
- ¶ 115. § 166. General powers and duties.
- Original letters in two states.
- § 19. Sending copies of papers to state department.
- ¶ 116. § 160. Foreign representative may sue or be sued without local letters.
- ¶ 117. Administration of an estate by action.

¶ 111 Grant and Issue of Ancillary Letters Testamentary and of Administration.

Ancillary letters granted upon exemplified copies of foreign wills filed and recorded in the surrogate's county.

The Surrogate's Court Act is intended to preserve and does consistently preserve a marked distinction between wills admitted to probate in this State and those which are permitted to be filed or recorded upon the production of an exemplified record of probate in a foreign State. Upon wills of the latter class the surrogate's power is limited to the issue of ancillary letters testamentary, or ancillary letters of administration with the will annexed. (§ 189.)

Section 161 limits the issue of such letters to the person named in the foreign letters or to the person otherwise entitled to the possession of the personal property of the decedent, "unless another person applies therefor, and files with his petition an instrument executed by the foreign executor or administrator, or person otherwise entitled as aforesaid,
* * * authorizing the petitioner to receive such ancillary

letters.” As was remarked in *Montgomery v. Boyd* (78 App. Div. 64, 71), with respect to a nonresident decedent leaving assets in this State, “no one can take out administration here except through, or by the voluntary action of the foreign executors.”

The surrogate has no authority to issue principal letters in a case where the will of the testator is not produced and proven before him. Original or principal letters as distinguished from those of an ancillary character can be issued only on proof of the will.

The fact that the will is filed and remains in another State does not change the situation, for the reason that a commission might be issued to take proof of the will and the commissioners would be considered as officers of the court and the production of the will before them would be held to be a production before the court in the person of its commissioner. *Russell v. Hartt*, 87 N. Y. 19; *Matter of Delaplaine*, 45 Hun, 225.

General nature of ancillary letters. See also ¶ 102.

Where letters have been duly issued in another State or country, provision has been made for the granting in this State of ancillary letters which authorize the person so appointed to deal with the assets or property which may be located in this State.

The granting of such letters here is made necessary because the foreign representative is generally without authority to act in our jurisdiction or to afford the protection to creditors and other persons residing here which the grant of ancillary letters confers.

Letters granted in this State upon the estate of a person domiciled in another State are subsidiary to those granted in the foreign State and relate exclusively to the assets within this State. *Black v. Woodman*, 5 Redf. 363. They are termed ancillary, while all others are principal letters. *Carroll v. Hughes*, 5 Redf. 337.

The chief object of the provisions of the Act as to ancillary

letters of administration of estates is to preserve and protect the claims of creditors residing in this State. This is apparent when certain sections are considered. Thus, section 162 requires that a citation must issue to all such creditors before ancillary letters can be granted. Section 163 provides that upon the return of the citation the surrogate must ascertain as nearly as he can do so the amount of debts due or claimed to be due from the decedent to residents of the State, and that before ancillary letters are issued the person to whom they are awarded must qualify by giving a bond which may, in the discretion of the surrogate, be limited to such a sum, not exceeding twice the amount which appears to be due from the decedent to the residents of the State, as will, in the surrogate's opinion, effectually secure the payment of those debts, and the only authority which is expressly given to a surrogate to direct any other disposition of funds in the hands of one holding ancillary letters than the transmission of the same as prescribed by section 164 to the State, territory, or country where the principal letters were granted, to be disposed of pursuant to the laws thereof, is section 165. There, discretionary power is vested in the Surrogate's Court to direct the payment out of moneys received in this State of such debts as the decedent owed to persons residing in the State. *Matter of Gennert*, 96 App. Div. 8.

Ancillary letters upon foreign probate.

Where a will of personal property made by a person who resided without the state at the time of the execution thereof, or at the time of his death, has been admitted to probate or established within the foreign country, or admitted to probate within the state or the territory of the United States, where it was executed, or where the testator resided at the time of his death; the surrogate's court having jurisdiction of the estate, must, upon an application made as prescribed in this article, accompanied by a copy of the will, and of the foreign letters, if any have been issued, authenticated as prescribed in section forty-five of the decedent estate law, record the will and the foreign letters, and issue thereupon ancillary letters testamentary, or ancillary letters of administration with the will annexed, as the case requires.

§ 159, *Sur. Ct. A.* Former § 2629, *Code Civ. Pro.*

Ancillary letters may be issued if the will has been "established" in the foreign country. Heretofore the will must have been "admitted to probate," but in some countries there is no such proceeding.

"Established" as used in this section includes the proceeding in a French city by which a will executed before a notary and witnesses is pronounced valid, and ancillary letters may therefore issue to the universal legatee named therein. *In re Harwood*, 104 Misc. Rep. 653, 172 N. Y. Supp. 296.

In this decision Mr. Surrogate Fowler says that the amendment of 1914 which inserted the word "established" relieved the law from the restrictions put upon it by *Matter of Connell*, 221 N. Y. 190.

Under the former section 2695 of the Code of Civ. Pro. "admitted to probate" was held not to include a will signed before a notary and filed, and so becoming effective under the foreign law without the sanction of a court of competent jurisdiction. *In re Connell's Will*, 221 N. Y. 190, revg. 92 Misc. Rep. 324, 155 N. Y. Supp. 397.

The amendment of 1914 added the words "or established within the foreign country" which were probably intended to make effective here those wills executed before notaries and filed in accordance with the foreign law.

Idem; upon foreign grant of administration.

Upon application by the party entitled as hereinafter provided, or by his duly authorized attorney-in-fact made as prescribed in this article, to a surrogate's court having jurisdiction of the estate, and upon the presentation of a copy, authenticated as prescribed in section forty-five of the decedent estate law, of letters of administration upon the estate of a decedent who resided at the time of his death without this state, but within the United States, granted within the state or territory where the decedent so resided, or, in cases where the decedent, at the time of his death, resided without the United States, upon the presentation to such surrogate's court of satisfactory proof that the party so applying either personally or by such attorney-in-fact, is entitled to the possession in the foreign country of the personal estate of such decedent, the surrogate's court to which such copy of such foreign letters so authenticated, or such proof, is so presented, must issue ancillary letters of administration in accordance with such application, except in the following cases:

1. Where original letters testamentary or ancillary letters upon foreign pro-

bate have been previously issued, or the application therefor has not been finally disposed of.

2. Where original letters of administration, upon the estate, have been previously issued to a person entitled to the same, who is legally competent to act, or the application therefor has not been finally disposed of.

§ 160, *Sur. Ct. A.* Former § 2630, *Code Civ. Pro.*

¶ 112 To Whom Granted; Petition and Citation.

To whom ancillary letters granted.

Where the will specially appoints one or more persons as the executor or executors thereof, with respect to personal property situated within the state, the ancillary letters testamentary must be directed to the person or persons so appointed, or to those who are competent to act and who qualify. If all are incompetent or fail to qualify, or in a case where such an appointment is not made, ancillary letters testamentary, or ancillary letters of administration, issued as prescribed in this article, must be directed to the person named in the foreign letters or to the person otherwise entitled to the possession of the personal property of the decedent, unless another person applies therefor, and files with his petition, an instrument, executed by the foreign executor or administrator, or person otherwise entitled as aforesaid; or, if there are two or more, by all who have qualified and are acting; and also acknowledged, or proved, and duly certified, authorizing the petitioner to receive such ancillary letters, in which case, the surrogate must, if the petitioner is a fit and competent person, issue such letters, directed to him. Where two or more persons are named in the foreign letters, or in an instrument executed as prescribed in this section, the ancillary letters may be directed to either or any of them, without naming the others, if the others fail to qualify, or if, for good cause shown to the surrogate's satisfaction, the decree so directs. § 161, *Sur. Ct. A.* Former § 2631, *Code Civ. Pro.*

Proof of the authorization to receive letters must be acknowledged and proved and duly certified as defined in subd. 15 of § 314, Surrogates' Court Act.

To whom granted.

No one can take out ancillary letters here except with the consent of or by the voluntary action of the foreign executors. *Montgomery v. Boyd*, 78 App. Div. 64, 71, 79 N. Y. Supp. 879; *Matter of McCauley*, 49 Misc. Rep. 209, 99 N. Y. Supp. 238; *Baldwin v. Rice*, 183 N. Y. 55, 35 Civ. Pro. Rep. 127; reargument denied, 184 N. Y. 523.

An order to show cause why he should not take letters in this State or be held to have renounced served upon a foreign

executor does not authorize the surrogate to appoint a person not entitled to letters, and the appointment when so made is void. *Baldwin v. Rice*, 100 App. Div. 241; aff'd, 183 N. Y. 55; aff'g, 44 Misc. Rep. 64.

Administration with the will annexed.

Ancillary letters will not be granted to the representative of the deceased executor, although a residuary legatee in the foreign will. The section restricts the appointment to a person entitled to the possession of the property of the original estate. *Matter of McShane*, 73 Misc. Rep. 146, 132 N. Y. Supp. 470.

Nonresident testator; executor dead; no foreign administrator with will annexed. Application by a resident legatee for ancillary letters *cum testamento annexo* granted. *Matter of Wise*, 2 Civ. Pro. Rep. 230.

Petition; citation.

An application for ancillary letters testamentary, or ancillary letter of administration, as prescribed in this article, must be made by petition which must set forth the amount of security given on the original appointment, the name and residence of each creditor, or person claiming to be a creditor residing within the state, and the amount of his claim so far as the same may be ascertained. Citation shall thereupon issue to the state comptroller, and to such creditors, and may issue generally to all creditors or persons claiming to be creditors, residing within the state. § 162, *Sur. Ct. A.* Former § 2632, *Code Civ. Pro.*

The petition should set forth the facts fully, including the amount of security given upon the original appointment, and whether there are creditors residing in the State.

Additional requirement under Tax Law.

By section 228 of the Tax Law it is required that the petition shall set forth the name of the state comptroller and a statement of decedent's property in this state and its value, and the surrogate is given special jurisdiction to determine the tax due the state.

Every petition for ancillary letters testamentary or ancillary letters of administration made in pursuance of the provisions of article seven, title three, chapter

eighteen of the code of civil procedure shall set forth the name of the state comptroller as a person to be cited as therein prescribed, and a true and correct statement of all the decedent's property in this state and the value thereof; and upon the presentation thereof the surrogate shall issue a citation directed to the state comptroller; and upon the return of the citation the surrogate shall determine the amount of the tax which may be or become due under the provisions of this article and his decree awarding the letters may contain any provision for the payment of such tax or the giving of security therefor which might be made by such surrogate if the state comptroller were a creditor of the decedent.

From § 228, Tax Law.

Who may petition.

When this section is read in connection with the other sections relating to ancillary letters, it is clear that the Surrogate's Court can obtain jurisdiction only upon the petition of the person to whom letters of administration or letters testamentary have been issued in another State, Territory, or country, or else upon the petition of a creditor residing in this State. No provision is made by which jurisdiction can be invoked by a creditor residing in another State. *Baldwin v. Rice*, 100 App. Div. 241; aff'd, 183 N. Y. 55, 35 Civ. Pro. Rep. 127.

Papers and proof.

Who are entitled to the personal estate where the deceased died a resident of a foreign country may be shown by the laws of that country, and must be proved where no letters have been issued in the foreign country. *Matter of Prevost*, 89 Misc. Rep. 704.

There must be proof that the testator resided out of this State at the time of his death, or at the time of the execution of the will, and that the next of kin here had notice of the application for probate. *Matter of Gavin*, 18 N. Y. St. Repr. 399, 2 N. Y. Supp. 670.

Application for ancillary letters must be made upon exemplified copies of the will, and duly authenticated letters issued, and the full names of all creditors residing within the State must be given. *Matter of Thompson*, 1 Civ. Pro. Rep.

264; *Baldwin v. Rice*, 183 N. Y. 55, 35 Civ. Pro. R. 127; aff'g, 100 App. Div. 241.

Ancillary letters testamentary may be granted on filing exemplified copy of probate proceedings had in another State.

It is not necessary that letters testamentary should have been first issued in the foreign State. *Matter of Langbein*, 1 Dem. 448.

If probate is granted in the foreign State without the entry of a decree or order, that fact should be certified to in the exemplification, or the omission should be supplied by affidavit. *Matter of Hudson*, 5 Redf. 333.

There must be a petition which must set forth the jurisdictional facts. *Matter of Langbein*, 1 Dem. 448.

¶ 113 Hearing; Decree and Security Required.

Hearing; security.

Upon the return of the citation, the surrogate must ascertain, as nearly as he can do so, the amount of debts due or claimed to be due from the decedent to residents of the state. Before ancillary letters are issued, the person to whom they are awarded, must qualify, as prescribed for the qualification of an administrator upon the estate of an intestate; except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of the state, as will, in the surrogate's opinion, effectually secure the payment of those debts; or the sums which the resident creditors will be entitled to receive, from the persons to whom the letters are issued, upon an accounting and distribution, either within the state, or within the jurisdiction where the principal letters were issued. If however there appear to be no such creditors, or transfer tax assessable, such letters may issue without a bond. Unless the citation, upon return of which the application is made, was directed generally to all creditors or persons claiming to be creditors residing within the state and was duly served by publication, the surrogate, in his discretion, may require that such a citation issue and be so served, returnable at an adjourned day, before such letters may issue without a bond. (Amended by Laws 1920, ch. 495, § 1. In effect Sept. 1, 1920.)

§ 163, *Sur. Ct. A.* Former § 2633, *Code Civ. Pro.*

The surrogate may dispense with a bond where there appear to be no creditors or transfer tax assessable where the citation has been directed to all creditors and has been served by publication, and no creditors have appeared. There

have been many cases where the only asset was a bank deposit, and the giving of a bond was useless.

Letters granted.

A will probated by the United States consul in China may be presumed to have been executed according to the laws of China, and ancillary letters may issue upon the proper exemplified copies. *Matter of Taintor*, 5 Redf. 79.

The fact that the person applying had been appointed administrator in a foreign country and was entitled to the assets of the estate authorizes ancillary letters here. *Matter of Willett*, 76 Hun, 211, 27 N. Y. Supp. 785.

Letters refused.

Where a will and codicil have been probated in this State, and the codicil in another State, ancillary letters will not be issued to the foreign representative since the original administration is in this State, and it would be inconsistent to grant ancillary administration also. *Matter of Eaton*, 102 Misc. Rep. 370, 169 N. Y. Supp. 871.

Ancillary letters were issued on a will probated in Louisiana, but executed in and by a resident of Alabama — held that the New York surrogate had no jurisdiction. *Taylor v. Syme*, 162 N. Y. 513; revg. 17 App. Div. 517, 45 N. Y. Supp. 707.

Resident of New Jersey — will probated there — estate solvent — no personal property or creditor in New York — held ancillary letters should not have been granted. *Matter of Gennert*, 96 App. Div. 8, 89 N. Y. Supp. 37.

Letters refused where it was not claimed that there was any property in this State belonging to deceased. *Evans v. Schoonmaker*, 2 Dem. 249.

Application pending.

The surrogate may decline to grant ancillary letters of administration when an application for original letters is pend-

ing. *Matter of Williams*, 5 Dem. 292, 5 N. Y. St. Repr. 361; aff'd, 44 Hun, 67, 8 N. Y. St. Repr. 437; aff'd, 111 N. Y. 680.

Decree.

The decree must award letters to the person entitled thereto, must fix the amount of security to be given, and should direct whether the assets, or any part of them, shall be retained and accounted for in that court. See § 164, ¶ 114.

Security.

The surrogate may, in his discretion, fix the penalty of the bond at twice the amount of the personal estate when he considers such a bond to be needed for the protection of all parties. *Matter of Prout*, 128 N. Y. 70; aff'g, 34 N. Y. St. Repr. 318; *Estate of Govan*, 2 Misc. Rep. 291, 23 N. Y. Supp. 766.

In fixing the amount of the bond, a surrogate may ignore a disputed claim which appears to be invalid. *Matter of Musgrave*, 5 Dem. 427.

Security may be dispensed with if there are no creditors or transfer tax or where a citation is issued to the creditors generally and has been served by publication, and no creditor appears. This change in the law will be particularly useful where a nonresident has a bank deposit and the only object of taking letters is to obtain its payment.

¶ 114 Whether Assets Shall be Transmitted or Retained.

Persons acting under ancillary letters must transmit assets.

The person to whom ancillary letters are issued, as prescribed in this article, must unless otherwise directed in the decree awarding the letters; or in a decree made upon an accounting; or by an order of the surrogate, made during the administration of the estate; or by the judgment or order of a court of record, in an action to which that person is a party; transmit the money and other personal property of the decedent, received by him after the letters are issued, or then in his hands in another capacity, to the state, territory, or country, where the principal letters were granted, to be disposed of pursuant to the laws thereof.

§ 164, *Sur. Ct. A. Former* § 2634, *Code Civ. Pro.*

When they may be directed to pay, etc., without transmission.

The surrogate's court, or any court of the state, which has jurisdiction of an

action to procure an accounting, or a judgment construing the will, may in a proper case, by its judgment or decree, direct a person, to whom ancillary letters are issued as prescribed in this article, to pay, out of the money or the avails of the property, received by him under the ancillary letters, and with which he is chargeable upon his accounting, the debts of the decedent, due to creditors residing within the state; or, if the amount of all the decedent's debts here and elsewhere exceeds the amount of all the decedent's personal property applicable thereto, to pay such a sum to each creditor, residing within the state as equals that creditor's share of all the distributable assets, or to distribute the same among the legatees or next of kin, or otherwise dispose of the same, as justice requires.

§ 165, *Sur. Ct. A.* Former § 2635, *Code Civ. Pro.*

Procedure to obtain order as to disposition of funds.

Section 164 directs assets to be remitted unless a decree or an order has been made directing other disposition of the fund.

In the ordinary case it would be the sole duty of the surrogate to first protect the local creditors and then order the assets transmitted to the foreign jurisdiction.

If a notice to creditors has been published, then at the expiration of such notice a settlement can be had (§ 261, ¶ 378.)

In re Conklin (15 N. Y. St. Repr. 748), the surrogate on an accounting of the ancillary executor granted the motion of the foreign executor to order assets transmitted to the foreign jurisdiction.

See *In re Dunn* (39 App. Div. 510, 57 N. Y. Supp. 444), where the procedure is discussed and it was held that no distribution should be made.

By section 165, the surrogate is authorized to direct distribution of assets in his jurisdiction to creditors, or among legatees and next of kin as justice requires.

Transmitting assets by ancillary executors.

He must remit all collected assets to the original probate jurisdiction, unless there are creditors who are citizens of our own State, in which event a distribution may be ordered here. *Hopper v. Hopper*, 125 N. Y. 400; *aff'g*, 53 Hun, 397, 25 N. Y. St. Repr. 132, 6 N. Y. Supp. 271.

Discussion of the duty of our courts to direct transmission

of assets to court of original jurisdiction upon which our Code provisions were founded. *Parsons v. Lyman*, 20 N. Y. 103.

Whether the court here will decree distribution or direct the remission of the assets to the foreign court is not a question of jurisdiction, but of discretion depending upon the circumstances of each case. *Matter of Hughes*, 95 N. Y. 55.

Ancillary executor required to pay local debts and pay balance to a legatee named in the will. *Dammert v. Osborn*, 140 N. Y. 30; revg. 65 Hun, 585, 48 N. Y. St. Repr. 602, 20 N. Y. Supp. 474.

Accounting.

It is well settled that ancillary executors have the same general power in this State as domestic executors so far as personal property is concerned. *Lockwood v. United States Steel Corporation*, 209 N. Y. 375; *Smith v. Second National Bank*, 169 N. Y. 467; *Hoper v. Hoper*, 125 N. Y. 400, 404. In *Lockwood v. United States Steel Corporation*, *supra*, it was held:

“Ancillary administration in this state is regulated by statute, and an ancillary executor or administrator has the same general power as a domestic executor or administrator, except in disposing of the decedent's real property for the payment of his debts and funeral expenses.”

And in *Hoper v. Hoper*, *supra*, it was written:

“The Code provides (section 2702, now § 166, Sur. Ct. A.) that all the provisions of its eighteenth chapter relating generally to Surrogates' Courts and proceedings therein, and to the rights, powers, duties and liabilities of an executor or administrator shall, with some minor exceptions, apply to a person to whom ancillary letters are granted, and thus puts him upon a level, so far as his official character is concerned, with the ordinary executors appointed by our courts.”

Whether our courts will exercise the power they thus possess, and decree distribution of the assets collected in this jurisdiction under ancillary letters granted by them, or will remit the disposition thereof to the courts of the testator's domicile, is a question of discretion, to be determined with reference to the facts of each particular case. *Despard v.*

Churchill, 53 N. Y. 192; *Matter of Dunn*, 39 App. Div. 510, 513, 57 N. Y. Supp. 444; *Matter of Hughes*, 95 N. Y. 55. *In re James*, 159 N. Y. Supp. 140.

The procedure on the accounting is governed by the laws of this State and, therefore, commissions and costs may be allowed from the fund. The question of interest on legacies is governed by the law of the domicile. *Matter of Kucielski*, 49 Misc. Rep. 404, 99 N. Y. Supp. 828; *N. Y. Life Ins. Co. v. Viele*, 161 N. Y. 11; *aff'g*, 22 App. Div. 80, 47 N. Y. Supp. 841. § 224, ¶ 208.

The law of Austria does not allow interest upon pecuniary legacies at the expense of the residuary legatees, and all legacies share *pro rata* in the entire income and are charged *pro rata* with the administration expenses. *Matter of Kucielski*, 49 Misc. Rep. 404.

Domicile in Pennsylvania. Letters issued in New York and all the personal estate brought to New York — *held*, that as it was not shown that there were any creditors in Pennsylvania distribution would be decreed in New York. *Matter of Hughes*, 95 N. Y. 55.

A petition to compel an ancillary administrator to account and pay a distributive share is properly denied where the heirs residing in the country of decedent's domicile, and not being before the court, claim that the distributee is indebted to the estate. *Matter of Dunn*, 39 App. Div. 510, 57 N. Y. Supp. 444.

Distribution to an ancillary administrator.

Where there is a local administrator of a legatee and also an ancillary administrator following an appointment of an administrator in a foreign country without bonds, distribution may be made to the local administrator of a legatee in preference to the ancillary administrator. *Matter of Schmid*, 116 App. Div. 706, 102 N. Y. Supp. 80.

¶ 115 Powers and Duties; Original Letters in Two States.

General powers and duties.

The provisions of this act, relating to the rights, powers, duties and liabilities of an executor or administrator, apply to a person to whom ancillary letters are granted, as prescribed in this article; except those contained in article thirteen relating to the mortgage, lease or sale of real property, or where special provision is otherwise made in this article; or where a contrary intent is expressed in, or plainly to be inferred from, the context.

§ 166, *Sur. Ct. A.* Former § 2636, *Code Civ. Pro.*

Powers of ancillary executors and administrators.

An ancillary executor or administrator has the same general powers as a domestic executor or administrator except in the particulars specified in this section.

The exceptions mentioned in such section do not curtail or limit the title of an ancillary administrator or executor to the assets of the estate in his hands, but such title is coextensive with that of a domestic or principal representative. *Smith v. Second National Bank*, 169 N. Y. 467; revg. 52 App. Div. 631; *Bingham v. Marine Nat. B.*, 112 N. Y. 661; aff'g, 41 Hun, 377, 2 N. Y. St. Repr. 638.

An ancillary administrator pledged a bond for a loan, stating that the proceeds were to be used for the purposes of the estate — held a legal pledge and that the debts so created must be paid before the redelivery of the bond could be compelled. *Smith v. Second National Bank*, 169 N. Y. 467; revg. 52 App. Div. 631.

It is the duty of the ancillary administrator to collect all assets belonging to the estate. *Bingham v. Marine Nat. Bank*, 41 Hun, 377, 2 N. Y. St. Repr. 638; aff'd, 112 N. Y. 661; *Maas v. German Sav. Bank*, 176 N. Y. 377; aff'g, 73 App. Div. 524, 77 N. Y. Supp. 256, which revd. 36 Misc. Rep. 154, 72 N. Y. Supp. 1068, which aff'd, 35 Misc. Rep. 193.

Rights of representatives when there are original letters in two states.

The executor in this State should transmit the assets after administering in this State to the State of the domicile. *Clark v. Butler*, 4 Dem. 378.

Where a will was proved in Michigan and New York, with separate executors and separate assets in each State, the New York executor has no title to assets in Michigan. *Sherman v. Page*, 85 N. Y. 123, distinguishing *Matter of Butler*, 38 id. 397.

Intestate was killed in another State and action to recover damages for his death was brought by an administrator regularly appointed in New York State — *held* regular. *Leonard v. Columbia S. N. Co.*, 84 N. Y. 48; *Kiefer v. Grand Trunk Ry. Co.*, 12 App. Div. 28, 42 N. Y. Supp. 171; *aff'd*, 153 N. Y. 688. See ¶¶ 417-419.

What papers to be transmitted to secretary of state or state comptroller; expenses thereof.

A surrogate who admits to probate the will of a person who was not a resident of the state at the time of his death, or grants original or ancillary letters testamentary upon such a will or original or ancillary letters of administration upon the estate of such a person, must, within ten days thereafter, transmit to the secretary of state, to be filed in his office, a certified copy of the will or letters.

The surrogate must, within ten days after granting letters of administration to a county treasurer, transmit to the state comptroller a certified copy of such letters.

§ 19, *Sur. Ct. A. Former* § 2489, *Code Civ. Pro.*

¶ 116 A Foreign Representative May Now Sue or be Sued in the Courts of This State.

Prior to the year 1911, by a long line of cases, the doctrine had become firmly established that a foreign executor or administrator could not sue or be sued in the courts of this State. *Hopper v. Hopper*, 125 N. Y. 400; *Mowell v. Dickey*, 1 Johns. ch. 153; *Doolittle v. Lewis*, 7 Johns. ch. 45; *Johnson v. Wallis*, 112 N. Y. 230.

Therefore it was necessary for the foreign representative to take ancillary letters in this State, for when ancillary letters have been issued to a foreign executor, he thereby acquires an official and representative character as executor here and so may sue and be sued in his representative character in this State. *Hopper v. Hopper*, 125 N. Y. 400; *aff'g*, 53 Hun, 397, 25 N. Y. St. Repr. 132, 6 N. Y. Supp. 271.

But in the year 1911 this well settled and conservative rule was abrogated by the adoption of § 1836-a of the Code of

Civil Procedure, which has been re-adopted as section 160 of the Decedent Estate Law and reads as follows:

An executor or administrator duly appointed in any other state, territory or district of the United States or in any foreign country may sue or be sued in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued, if, within twenty days after any such executor or administrator shall commence, or appear in, any action or proceeding in any court in this state or within twenty days after he shall be required or directed by summons or otherwise to appear therein, there shall be filed in the office of the clerk of the court, in which such action or proceeding shall be brought or be pending, a copy of the letters testamentary or letters of administration issued to such executor or administrator duly authenticated as prescribed by section forty-five of this chapter; in default whereof all proceedings in such action or proceeding may be stayed until such duly authenticated copy of such letters shall be so filed.

§ 160, *Dec. Est. L.* Former § 1836-a, *Code Civ. Pro.*

While this section was probably intended to make actions for negligently killing more easily brought, it has a far wider effect, and can be used to seriously interfere with the proper administration of estates.

Under its terms a bank or individual holding money or personal property of a deceased person may be sued for the recovery of the same by a foreign representative who has not taken out ancillary letters here, and who would not be entitled to receive payment in the first instance. The fear of successful suit, leads a bank or individual to turn over such money or property in settlement of the action, and the property is then removed from the State, with no protection given to the rights of local creditors.

May receive assets and give good discharge.

The history of this legislation was discussed by Cardozo, J., in *Helme v. Buckelew*, 229 N. Y. 363, and the inconsistency of this statute with the general scheme for the administration of estates pointed out.

In holding that the application of the statute must be limited far beyond its apparent license, the court said:

“I think the true view must therefore be that the statute removes disabilities,

but does not terminate immunities. These are what they always were. Foreign administrators and executors may sue in the same manner as nonresidents, for comity may enlarge the measure of their rights as plaintiffs without encroaching upon the jurisdiction of other courts, or overstepping the limits of our own. Foreign administrators and executors may be sued in the same manner as nonresidents, but only when the subject matter subjects them to the jurisdiction; for comity, though it may enlarge their rights, cannot, unless it is also the comity of the domicile, enlarge their liability, and there is nothing in the statute that unmistakably reveals a purpose to assume, in disregard of comity, a jurisdiction which the accepted principles and usages prevailing between different sovereignties have heretofore condemned. The statute, therefore, in so far as it touches the liabilities of defendants, is effective within a narrow field. The rule which prevailed in equity has gained legislative sanction. It has also been regulated in respect of matters of procedure. A stay of proceedings may be obtained if a copy of the foreign letters is not filed within the time prescribed. Moreover, the foreign representatives, if sued, are put in the same class as nonresidents, with consequent privileges and burdens which we need not now define. To go farther, and hold them subject generally to actions in personam, would involve us not only in problems of constitutional power and complications of international usage, but in a cumbrous and inconsistent and unworkable procedure which would disorganize the scheme disclosed in other statutes, and there carefully developed, for the administration of estates. This isolated section which develops no scheme of its own, and which seems to take for granted a scheme into which it fits, did not obliterate the historic landmarks and leave the fields without a monument."

Payment of a bank deposit to a foreign administrator discharges the bank, even though afterward a will of the same person is found and proved in this State and demand is made for payment. *Schluter v. Bowery S. B.*, 117 N. Y. 125; *Boone v. Citizens S. B.*, 84 id. 83; revg. 21 Hun, 235.

A debtor to a nonresident is not charged with notice of the appointment of a local administrator on the estate of a nonresident from the fact that such appointment is a matter of record in the Surrogate Court of some county of the State. *Maas v. German Savings Bank*, 176 N. Y. 377; aff'g, 73 App. Div. 524, 77 N. Y. Supp. 256; which revd. 36 Misc. Rep. 154, 72 N. Y. Supp. 1068; which aff'd, 55 Misc. Rep. 193, 71 N. Y. Supp. 483.

May sue or be sued here upon contracts made with him here.

Foreign executor may sue in our courts upon contract made

with him as such executor. *Flandrow v. Hammond*, 13 App. Div. 325, 4 Ann. Cas. 56, 43 N. Y. Supp. 143.

A foreign executor may be sued in this State upon a contract made by him, *Johnson v. Wallis*, 112 N. Y. 230; aff'g, 41 Hun, 420; or where it is necessary to determine the title to property in this State, *Holmes v. Camp*, 219 N. Y. 359.

¶ 117 Administration of Estate by Supreme Court in Equity Action.

Under certain conditions resident creditors may be unable to obtain payment of their claims from the foreign representative of a deceased debtor. They may also be unable to reach in the regular way property of the deceased situated here. In such a case the Supreme Court will entertain an equity action on behalf of all creditors for the administration of the property of the deceased situated in this State, and for its application to the payment of debts. *De Coppet v. Cone*, 199 N. Y. 56; aff'g, 132 App. Div. 928.

In the case of *William Fox v. Lawrence Mulligan and Patrick H. Sullivan as Executors, etc., of Timothy D. Sullivan*, a receiver of the estate was appointed by the Supreme Court, which also restrained creditors and other persons from bringing any actions or proceedings relating to the estate.

Where the first representative has died, the action does not abate and the successor may be substituted. *Thorburn v. Mitchell*, 191 A. D. 506, 181 N. Y. Supp. 520.

CHAPTER XXIX.

Bonds and Undertakings; Approval, Recording, Prosecution and Discharge; Sureties, Their Release, Rights and Obligations; Actions on Bonds.

- ¶ 118. § 105. General requirements as to execution, approval and recording of bonds.
- § 156. Execution by surety companies.
- ¶ 119. § 153. Justification by several sureties.
- § 106. Deposit of securities to reduce penalty.
- ¶ 120. § 107. Requiring new bond or new sureties.
- § 108. Principal may be required to give new bond.
- ¶ 121. § 110. Proceedings thereon.
- § 158. Application by surety company.
- ¶ 122. § 111. Principal may substitute new bond or surety after judicial settlement.
- ¶ 123. § 112. Liability of sureties.
- ¶ 124. § 159. Action on official bonds generally.
- Actions on bonds of executors, etc.
- ¶ 125. § 113. When bond may be prosecuted.
- § 115. When no successor appointed.
- ¶ 126. § 114. When successor has been appointed.
- ¶ 127. § 116. Discharge of bond or undertaking given on appeal or for performance of an act.
- § 117. Application of this article to executors heretofore appointed.

¶ 118 General Requirements as to Bonds; Execution by Surety Company.

Approval and recording of bonds and undertakings.

Except as otherwise provided in this act, the provision of law relating to bonds and undertakings in a civil action in the Supreme Court shall apply to bonds or undertakings in the Surrogate's Court.

All bonds and undertakings to be filed in the surrogate's court must be approved by the surrogate or acting surrogate, except that in counties containing a city of the first or second class or a part of such city, the surrogate or surrogates may, in writing, designate a clerk in the office to approve all or any class of bonds or undertakings, and when approved such bonds and undertakings must be recorded.

§ 105, *Sur. Ct. A.* Former § 2575, *Code Civ. Pro.*

The Surrogate's Court Act does not contain all the requirements as to bonds and security and justification of sureties, but resort must be had to the Rules of Civil Practice and the Civil Practice Act for the regulations concerning those matters. The familiar sections of the Code of Civil Procedure beginning with number 810 have been distributed to the Rules and different parts of the Civil Practice Act.

Rule 25, regarding form and requisites of bond or undertaking, applies only partially to bonds in Surrogate's Court because of the special provisions for bonds in that court, and in the different special proceedings.

When bond deemed an undertaking.

A provision of law authorizing or requiring a bond to be given shall be deemed to have been complied with by the execution of an undertaking to the same effect. § 14, General Construction Law.

Proof of acknowledgment.

Where the acknowledgment is taken out of the county, a county clerk's certificate should be attached, and if taken out of the State or country, such authentication should be furnished as would be necessary to record the paper as a deed. See Rules of Civ. Prac. 25.

Approval of nonresident sureties.

Where one or more of the sureties offered are not residents of the surrogate's county, it is the practice to require the bond to be first presented to the surrogate of the county where such nonresident surety or sureties resides or reside, and procure from him a certificate endorsed thereon to the effect that if such bond were presented to him in a proceeding of which he had jurisdiction he would accept the surety or sureties so named as residing in his county.

There is no statute requiring bonds executed by sureties not residing in the county to be approved by the surrogate of the county of their residence, but the practice is quite general

to require it to be done. When a surrogate approves a bond executed by a resident of his county it is assumed that he knows something about his responsibility, which knowledge does not seem to be imputed to him if the surety is a nonresident of the county. As the surrogate approving a bond must be satisfied as to the sufficiency of the surety, it is in his discretion as to how he shall become satisfied, and most of the surrogates have adopted the rule that they would be satisfied if the bond was endorsed by the surrogate of the other county.

Justification of surety upon two or more bonds offered at the same time.

Where the same surety justifies upon two or more bonds filed at the same time, some surrogates require the amount in which the surety justifies to be increased in the second bond by the amount of the penalty of the first bond.

Condition of bonds; effect of change of parties.

Unless otherwise provided by statute or rule, whenever a bond or undertaking is required in a civil action or special proceeding, it shall be to the effect that the principal shall faithfully and fairly discharge the duties and fulfill the obligations imposed by law or rules and the special order of the court. A bond or undertaking given in an action or special proceeding continues in force after a change of parties; and has thereafter the same force and effect as if then given anew in conformity to the change of parties.

§ 148, *Civ. Pr. A.* Former § 815, *Code Civ. Pro.* amended.

The first sentence of this section is new and prescribes generally the condition to be inserted in a bond. In many of the sections of the Surrogate's Court Act the condition of the bond for each special proceeding is specified. For example, see administrator's bond, § 121.

Substantial compliance as to form; amendment.

A bond or undertaking in an action or special proceeding is sufficient if it conforms substantially to the form therefor prescribed by the statute or rule and does not vary therefrom to the prejudice of the rights of the party to whom or for whose benefit it is given.

Where such a bond or undertaking is defective, the court, officer or body that would be authorized to receive it, or to entertain a proceeding in consequence

thereof, if it was perfect, may amend it accordingly, on the application of the persons who executed it and it shall thereupon be valid from the time of its execution.

§ 150, *Civ. Pr. A.* Former §§ 816, 729, 730, *Code Civ. Pro.*

Amending.

Where the parties who executed a bond appear and ask to have it annulled where it is imperfect the surrogate may correct it accordingly.

Irregularities.

In an administrator's bond the naming of the wrong county to the surrogate of which the administrator should account does not invalidate the bond. *Gerould v. Wilson*, 81 N. Y. 573.

A recital in the bond of an administrator that the surrogate is "about to issue letters" does not invalidate the bond. *Dayton v. Johnson*, 69 N. Y. 419.

A bond which erroneously runs to a person and not to the people, may still be prosecuted by any person interested. *Close v. Farmers L. & T. Co.*, 195 N. Y. 92.

United States bonds in lieu of cash bail.

Wherever this act or the rules authorize or require cash bail or security, unregistered bonds of the United States may be delivered to the proper officer or person in lieu of cash to the amount of the face value of the bonds.

§ 157, *Civ. Pr. A.*

This section is new and can be used where cash bail or security is authorized.

Execution of bonds and undertaking by surety companies.

Any bond or undertaking required to be furnished in Surrogate's Court may now be executed by a duly authorized surety company in place of one required to be executed by two sureties.

The execution of any bond or undertaking, in an action or special proceeding, by a fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties, and such company, if excepted to, shall justify through its officers

or attorney in the manner required by law of fidelity and surety companies. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking.

§ 156, *Civ. Pr. A.* Former § 811, *Code Civ. Pro.*

The first part of the original section 811, which says that the execution of a bond by a surety company shall be equivalent to its execution by two sureties, has been put into the Rules of Civil Practice.

Party may agree with surety for joint control of funds.

A party of whom a bond or undertaking is required may agree with his sureties for the deposit of any or all moneys for which such sureties are or may be held responsible with a trust company authorized by law to receive deposits, if such deposit is otherwise proper, and for the safe keeping of any or all other depositable assets for which such sureties may be held responsible, with a safe-deposit company authorized by law to do business as such, in such a manner as to prevent the withdrawal of such moneys and assets, or any part thereof, except with the written consent of such sureties, or an order of the court made on such notice to them, as it may direct.

§ 153, *Civ. Pr. A.* Part of former § 813, *Code Civ. Pro.*

A surety company is not empowered by law to act as a custodian or to take possession of the estate, even though the representative has made an agreement to that effect. The provision authorizing joint control does not mean that the representative is permitted to transfer the property itself to the surety. *Matter of Butts*, 109 Misc. Rep. 348, 179 N. Y. Supp. 877.

The surety company may obtain ample protection under § 153, Civil Practice Act, wherein it is provided that the surety company may require the person bonded to agree to deposit the securities with a company "authorized by law" to receive deposits of securities, from which they can be withdrawn only with the consent of the surety or of the court.

An agreement not to dispose of property without the consent of the surety company will be enforced. *Dickinson v. Colonial T. Co.*, 33 Misc. Rep. 668, 68 N. Y. Supp. 909.

An administrator has no right to deliver the estate prop-

erty to the sureties on his bond with an agreement for them to use the money and pay him interest. *Deobold v. Oppermann*, 111 N. Y. 531.

Additional security.

Where a bond or an undertaking has been or shall be given in an action or a proceeding, further or other security may be ordered in addition to such security. Upon cause shown an examination or re-examination of any surety upon any such undertaking may be ordered and upon such examination or re-examination, a new surety or sureties may be required to be furnished or further or other security to be given in addition to the security already given. Such order may be enforced by any disposition of the action or proceeding as may be proper. In the case of an undertaking upon an appeal, the order may be made only by the court in which the appeal is pending, except that if the undertaking be given to stay execution on a judgment for a sum of money or a judgment or order directing the payment of a sum of money, from which an appeal is taken to the court of appeals the order may be made only by the court below.

§ 149, *Civ. Pr. A.* Former §§ 813a, 1308 and 1327, *Code Civ. Pro.*

To which court application made.

Where appeals from certain judgments specified are taken to the Court of Appeals, the application for additional security must be made to the court below; in other cases it is made to the court in which the appeal is pending; an appeal from Surrogate's Court generally removes the proceeding to the appellate division.

¶ 119 Executed by More Than Two Sureties. Deposit of Securities to Reduce Penalty.

When several sureties may justify, each in a smaller sum.

Where the penalty of the bond, or twice the sum specified in the undertaking is five thousand dollars or upwards, the court or judge, in its or his discretion, may allow the sum in which a surety is required to justify to be made up by the justification of two or more sureties each in a smaller sum. But in that case a surety cannot justify, in a sum less than five thousand dollars, and when two or more sureties are required by law or rule to justify, the same person cannot so contribute to make up the sum for more than one of them.

§ 152, *Civ. Pr. A.* Former § 813, *Code Civ. Pro.*

Several sureties may be furnished in lieu of two sureties.

Where the penalty of the bond is \$5,000 or upward, the surrogate may accept more than two sureties, provided, how-

ever, that the penalty of the bond is twice made up, either by one person justifying in the full penalty and by two or more other persons together, justifying in the penalty, or by two distinct sets together justifying in the penalty.

Where two sureties are required by law to a bond, it is necessary that, unless each justifies in the full penalty, there should be two sets of justifications, each in such penalty; that is the penalty must be twice made up, either (1) by two persons each fully qualified, or (2) by one such person and two or more other persons, unitedly sufficient, or (3) by two distinct sets of persons, each set being unitedly worth the full penalty. *Trask v. Annett*, 1 Dem. 171.

Matter of Thompson (19 N. Y. St. Repr. 900, 6 Dem. 56), is no longer applicable by reason of the prohibition in this section against one surety contributing to make up the amount of the other.

Exception to sureties and justification.

Where a party desires to except to the sufficiency of the sureties to a bond or undertaking in an action or special proceeding, he may serve a written notice, within ten days after the service of a copy of the bond or undertaking, that he excepts to the sufficiency of the sureties. Within ten days thereafter, the sureties, or other sureties in a new bond or undertaking to the same effect, must justify before the court in which the action or proceeding is pending or a judge thereof, or a referee appointed by the same, or a county judge. At least five days' notice of the justification must be given. A referee may be appointed upon the motion of either party or upon the court's own motion to take the justification of such sureties and to report the evidence upon the same to the court or judge with his opinion. The court may further direct that either party shall pay the expenses of such reference. If the court or judge finds the sureties sufficient, he must indorse his allowance of them upon the bond or undertaking or a copy thereof, and a notice of the allowance must be served upon the attorney for the exceptant. The effect of a failure so to justify and procure an allowance is the same as if the bond or undertaking had not been given. The court shall also have power, in case it shall be made to appear to its satisfaction, upon motion, that the exception was taken unnecessarily or for purposes of vexation or delay, to set the same aside and approve the bond or undertaking, with costs.

§ 151, *Sur. Ct. A.* Former § 1335, *Code Civ. Pro.*

Heretofore there has seemed to be no procedure for excepting to the sufficiency of sureties offered on bonds in Surrogate's Courts and procuring their justification. The law pro-

vided that the surrogate must approve the bond (§ 105) but did not authorize any method of reconsideration of the approval. Section 1335, Code Civ. Pro., which applied to the justification of sureties on bonds given on appeal to the Court of Appeals, has been so amended as to apply to bonds given in Surrogate's Courts and there is now a well defined procedure laid down in the foregoing section.

Deposit of securities to reduce penalty of bond.

In a case where a bond, or new sureties on a bond, may be required by a surrogate from an executor, administrator, guardian, or testamentary trustee, if the value of the estate or fund is so great that the surrogate deems it inexpedient to require security in the full amount prescribed by law, he may direct that any securities for the payment of money, belonging to the estate or fund, be delivered to the county treasurer, or chamberlain, or be deposited subject to the order of the executor, administrator, guardian or testamentary trustee, countersigned by the surrogate, with a trust company, bank or safe deposit company. After such a deposit has been made, the surrogate may fix the amount of the bond with respect to the value of the remainder only of the estate or fund. A security thus deposited shall not be withdrawn from the custody of the depository, and no person other than the county treasurer, chamberlain or the proper officer of the depository, shall receive or collect any of the principal or interest secured thereby, without the special order of the surrogate. Such an order can be made in favor of such executor, administrator, guardian or testamentary trustee, only where an additional bond has been given by him, or upon proof that the estate or fund has been so reduced, by payments or otherwise, that the penalty of the bond originally given will be sufficient in amount to satisfy the provisions of law relating to the penalty thereof, if the security so withdrawn is also reckoned in the estate or fund.

§ 106, *Sur. Ct. A.* Former § 2576, *Code Civ. Pro.*

Effect of the order to deposit.

The effect of the order to deposit the securities and restraining the collection by the representative or guardian is to withdraw such property from the fund to be administered by the representative or guardian and take it out of the usual course of administration. The appointment may be made for the purpose of administering certain other property, while the property directed to be deposited needs no administration. *Wight v. Hayden*, 31 Misc. Rep. 116, 63 N. Y. Supp. 796, 798; *Matter of Butts*, 109 Misc. Rep. 348, 179 N. Y. Supp. 877.

Discharge of obligation and re-investment.

The letters issued from the Surrogate's Court are, in respect to the property directed to be deposited, limited and the representative is not given any right to or interest in the security, except a further order of the court be made granting such right or interest. When a security so deposited is collected or paid an application should be made to the Surrogate's Court setting forth the facts and asking for an order directing the representative, guardian or trustee to give an additional bond and where necessary execute a proper discharge of the indebtedness or security, and directing the custodian to turn over the proceeds, if already received. The custodian has no right or power to reinvest the money so paid in or collected. *In re Butman*, 130 App. Div. 156, 114 N. Y. Supp. 533. Where reduced to money the proceeds must be administered by the legal representative, guardian or trustee after giving the necessary bond.

Title of depositary.

While a note or other security remains in the custody of a depositary, the representative cannot sue upon the same or collect it, such depositary having the legal title and the right to sue and collect. *Ditmas v. McKane*, 92 App. Div. 344, 86 N. Y. Supp. 1083.

Compensation of depositary.

A trust company with whom the securities are deposited may have compensation for receiving and caring for such securities. *Matter of Butman*, 130 App. Div. 156, 114 N. Y. Supp. 533.

¶ 120 Requiring a New Bond or a New Surety.**When new bond or new sureties may be required.**

Any person interested in an estate or fund, may present to the surrogate's court a petition, setting forth that a surety on a bond, taken as prescribed in this act, is insufficient, or has removed, or is about to remove, from the state, or is dead, or that the bond is inadequate in amount; and praying that the prin-

principal in the bond may be required to give a new bond, in a larger penalty, or new or additional sureties, as the case requires; or in default thereof, that he may be removed from his office, and that letters issued to him may be revoked. Where the bond so taken is that of a guardian, the petition may also be presented by any relative of the infant. When the bond is that of an executor, or administrator, the petition may also be presented by any creditor of the decedent. If it appears to the surrogate that there is reason to believe that the allegations of the petition are true, a citation shall issue to the principal on the bond to show cause why the prayer of the petition should not be granted.

§ 107, *Sur. Ct. A. Former* § 2577, *Code Civ. Pro.*

In this section and in all other sections the language, "he shall issue" or "the surrogate shall issue" has been changed to "a citation shall issue" thus obviating the objection some practitioners have made to the regularity of certain citations issued by the clerk of the Surrogate's Court. This section now applies where a surety has died, which was not the case under the former section. See *Stevens v. Stevens*, 2 Dem. 469.

The section applied.

A proceeding by a surety to be relieved from further liability (§ 109) and a proceeding by a next of kin for the filing of a new bond cannot be joined and heard together. *Bick v. Murphy*, 2 Dem. 251.

Death of surety.

While under the present section a new surety can be asked for upon the death of one, yet it is not necessary in all cases to make the application, since the estate of a deceased surety still remains liable for the acts of the principal performed after the death of the surety. *Stevens v. Stevens*, 2 Dem. 469; *Mundorff v. Wangler*, 44 N. Y. Super. Ct. 495, 57 How. Pr. 372.

Idem; how principal may be required to give a new bond, et cetera.

Upon the return of a citation, issued as prescribed in the last section, the surrogate must hear the allegations and proofs of the parties; and if the allegations, or any of them, are found to be valid, he must make an order, requiring the principal on the bond to give new or additional sureties, or a new bond in

a larger penalty, as the case requires, within such reasonable time, not exceeding twenty days, as the surrogate fixes; and directing that, in default thereof, he be removed or his letters be revoked.

§ 108, *Sur. Ct. A.* Former § 2578, *Code Civ. Pro.*

¶ 121 Application by Surety to be Released.

Sureties may apply to be released as to future breaches.

Any or all of the sureties on a bond taken as prescribed in this act, may present a petition to the surrogate's court praying to be released from responsibility on account of any future breach of the condition of the bond, and that the principal on the bond be required to give new sureties and to render and settle his account, and that a citation issue to said principal to show cause why the application should not be granted.

§ 109, *Sur. Ct. A.* Former § 2579, *Code Civ. Pro.*

A proceeding by a surety to be relieved from further liability and a proceeding by a next of kin (§ 107) for the filing of a new bond cannot be joined and heard together. *Bick v. Murphy*, 2 Dem. 251.

Release of old sureties on the giving of new.

Upon the return of the citation issued as prescribed in the last section, if the principal on the bond does not file a new bond in the usual form with new sureties to the satisfaction of the surrogate, the surrogate must make an order requiring said principal to file such new bond within such reasonable time, not exceeding twenty days, as the surrogate fixes. Should the principal file such new bond upon the return of such citation or within the time fixed by such order, the surrogate must thereupon make a decree releasing the petitioner from liability upon the bond for any subsequent act or default of the principal, and requiring the principal to render and settle his account to and including the date of such decree, and to file such account within a time fixed, not exceeding twenty days from such date; otherwise he must make a decree removing such principal or revoking his letters.

§ 110, *Sur. Ct. A.* Former § 2580, *Code Civ. Pro.*

Decree may be made without bringing in all interested parties.

“ Without determining that an account filed under this section * * * can be litigated at the instance of the resigning surety, by the issuance of a supplemental citation to all parties in interest in the absence of any statute expressly permitting it, unless the surety objects to the account as filed and makes some further affirmative application, the proceed-

ing is at an end and must be closed by a decree settling the account on the motion of the accounting executor or administrator. Such a decree will, of course, not be binding upon strangers to the proceeding, but it places upon record the sworn declaration of the representative as to the condition of the estate at the time when the surety ceases to be bound for future defaulting, and may thus serve a useful purpose.” *Matter of Sogaard*, 39 Misc. Rep. 519, 521, 80 N. Y. Supp. 379; *Siebert v. Millbank*, 95 App. Div. 566.

Proceeding by surety or representative of a surety to be relieved from a bond under section 158, Civil Prac. A., formerly section 812, Code Civ. Pro.

A proceeding has been provided in section 158 of the Civil Practice Act whereby any surety or sureties or any representative of them may apply to the surrogate who approved the bond to be relieved from any further liability on account of the bond and to require the giving of a new surety or sureties.

This section also makes provision for the filing of the account of the principal up to the date of the order relieving the surety and for the settlement of such account when such settlement is advisable or necessary.

This section 158 is a substitute for that part of section 812, Code Civ. Pro., which provided the same relief, and has not been materially changed. It is a broader and more full and complete provision than that in section 109 of the Surrogate’s Court Act, and can be advantageously used in some cases instead of the proceeding given under section 109.

Discharge of Surety.

1. The surety or sureties or the representatives of any surety or sureties upon the bond heretofore or hereafter executed, of any trustee, committee, guardian, assignee, receiver, executor, administrator or other fiduciary, shall be entitled as a matter of right to be, and shall be, discharged from liability as hereinafter provided, and to that end, on notice to the principal named in such bond, may apply to the court that accepted such bond or to the court of which the judge that accepted such bond was a member or to any judge thereof, praying to be

relieved from liability as such surety or sureties for the act or omission of such principal occurring after the date of the order relieving such surety or sureties hereinafter provided for and that such principal be required to account and give new sureties.

2. Such notice of such application may be served on said principal personally within or without the state, not less than five days prior to the date on which such application is to be made, unless it satisfactorily appears to the court, or a judge thereof, that personal notice cannot be given with due diligence within the state, in which case notice may be given in such manner as the court or a judge thereof directs. Pending the hearing of such application the court or judge may restrain such principal from acting except to preserve the trust estate until further order.

3. Upon the hearing of such application, if the principal does not file a new bond in the usual form to the satisfaction of the court or judge, the court or judge must make an order requiring the principal to file a new bond within such reasonable time not exceeding five days as the court or judge in such order fixes. If such new bond shall be filed upon such hearing or within the time fixed by said order, the court or judge must thereupon make a decree or order requiring the principal to account for all his acts and proceedings to and including the date of such order and to file such account within a time fixed, not exceeding twenty days, and releasing the surety or sureties making such application from liability upon the bond for any act or default of the principal, subsequent to the date of such decree or order. If the principal fail so to file such new bond within the time specified, a decree or order must be made revoking the appointment of such principal or removing him and requiring him to so account and file such account within twenty days.

4. If the principal fail to file his account as in this section provided, such surety or sureties, or representatives thereof, may make and file such account with like force and effect as though made and filed by such principal, and upon the settlement thereof credit shall be given for all commissions, costs, disbursements, and allowances to which the principal would be entitled were he accounting, and allowance shall be made to such surety or sureties or representative for the expense incurred in so filing such account and procuring the settlement thereof.

5. After the filing of an account as required or permitted in this section, the court or judge, upon the petition of the principal or surety or sureties or the representatives of any such surety or sureties, must issue an order requiring all persons interested in the estate or trust funds to attend a settlement of such account at a time and place therein specified, and upon the trust fund or estate being found or made good and paid over or properly secured, the surety or sureties shall be discharged from any and all further liability, and the court or judge shall settle, determine and enforce the rights and liabilities of all parties to the proceedings in like manner and to the same extent as in actions for an accounting in the supreme court. Upon demand made in writing by the principal, such surety or sureties, or representatives thereof, shall return any compensation that has been paid for the unexpired portion of such suretyship.

§ 158, *Civ. Pr. A.* Former § 812, *Code Civ. Pro.*

The proceedings are substantially as follows:

The surety or sureties or the representatives of any surety or sureties shall be entitled as a matter of right to be and shall be discharged from any further liability on said bond when the proper proceedings are taken therefor.

Application.

Application for an order shall be made to the court that accepted such bond or to the court of which the judge that accepted such bond was a member, or to any judge thereof.

Such application shall be by petition setting forth the reasons therefor and shall pray that the applicant may be relieved from liability as such surety for any act or omission of such principal occurring after the date of the order asked for and further that such principal be required to account and give new sureties.

Notice of application.

Notice of such application must be served upon the principal named in such bond.

Service; how made.

Service may be made on the principal within or without the State not less than five days prior to the day on which such application is to be made.

If it satisfactorily appears to the court or judge thereof that personal notice cannot be given with due diligence within the State, notice may be given in such manner as the court or the judge thereof directs.

Principal restrained.

Pending the hearing of such application the court or judge may restrain such principal from acting except to preserve the trust estate.

Hearing, filing new bonds.

Upon the hearing of such application if the principal does not file a new bond in the usual form to the satisfaction of the

court or judge, the court or judge must make an order requiring the principal to file a new bond within such reasonable time not exceeding five days as the court or judge in any such order fixes.

Order to account.

If such a new bond be filed upon such hearing or within the time fixed by such order the court must thereupon make a decree or order requiring the principal to account for all his acts and proceedings to and including the date of such order and to file such account within a time fixed not exceeding twenty days.

Order releasing surety.

Such order shall also release the surety or sureties making such application from liability upon the bond for any act or default of the principal subsequent to the date of such decree or order.

Failure to file a new bond.

If the principal fail so to file such new bond within the time specified a decree or order must be made revoking the appointment of such principal or removing him and requiring him to so account and file such account within twenty days.

Failure to file account.

If the principal fail to file his account such surety or sureties or representatives thereof may make and file such account with like force and effect, as though made and filed by such principal, and upon the settlement thereof credit shall be given for all commissions, costs, disbursements, and allowances to which the principal would be entitled were he accounting, and allowance shall be made to such surety or sureties or representatives for the expense incurred in so filing such account and procuring the settlement thereof.

Such account may be judicially settled.

After filing the account so required or permitted, the court or judge must, upon the petition of the principal or surety or sureties or the representatives of any such surety or sureties, issue an order requiring all persons interested in the estate or trust funds to attend a settlement of such account at a time and place therein specified. Upon the trust fund or estate being found or made good and paid over or properly secured, the surety or sureties shall be discharged from any and all other liability, and the court or judge shall settle, determine, and enforce the rights and liabilities of all parties to the proceedings in like manner and to the same extent as in actions for an accounting in the Supreme Court.

The filing of the account may be required on the *ex parte* proceedings to release a surety, but it is not binding on all parties interested until it is settled upon notice to all such parties. *Siebert v. Milbank*, 95 App. Div. 566; *aff'd*, 180 N. Y. 535.

Return of premium.

Upon demand made in writing by the principal such surety or sureties or representatives thereof shall return any compensation that has been paid for the unexpired portion of such suretyship.

Application must be granted.

The application for release must be granted as a matter of right without regard to the discretion of the surrogate.

Return of unearned premium cannot be ordered as a condition for granting release. *Matter of American Surety Co.*, 61 Misc. Rep. 542, 115 N. Y. Supp. 860; *Matter of Kopp*, 168 N. Y. Supp. 944.

¶ 122 New Bond or Surety May be Substituted After Settlement.

Principal may substitute new bond or surety after judicial settlement.

Whenever there is pending in surrogate's court a proceeding for the intermediate judicial settlement of the account of an executor, administrator, guardian or testamentary trustee who has been required to file an official bond, such principal may ask in such proceeding, upon good cause shown, for leave to file a new bond or a new surety. If the surrogate grants such application he shall thereupon fix the penalty of the new bond, or the amount in which the new surety must justify, and upon the filing and approval of such new bond, or of the undertaking of the new surety, the surrogate may provide in the decree of judicial settlement that the former bond or surety be discharged from and after the date of such decree from all liability, except upon appeal therefrom, as to all matters embraced in said account and decree.

§ 111, *Sur. Ct. A.* Former § 2581, *Code Civ. Pro.*

While there was a provision that the surety might ask for a new bond, there was none that the principal might do so.

It often happens that when the bond is first given, the value of the personal assets is not well known, or it is not expected that more than a year's time will be necessary to close the estate. On account of these and other contingencies the estate may be paying for a larger bond than is necessary, and by this section that expense can be decreased. The surrogate will not of course make the order unless it is safe to decrease the bond a substantial amount.

Accounting can be had at any time after one year, or expiration of notice to creditors. § 261. ¶ 378.

¶ 123 Liability of Sureties.

Sureties liable for money, et cetera, received in another capacity.

A person to whom letters are issued is liable for money or other personal property of the estate which was in his hands, or under his control, when his letters were issued, in whatever capacity it was received by him, or came under his control. Where it was received by him, or came under his control, by virtue of letters previously issued to him in the same or another capacity, an action to recover the money, or damages for failure to deliver the property, may be maintained upon both official bonds; but, as between the sureties upon the official bond given upon the issue of the prior letters, and those upon the official bond given upon the issue of the subsequent letters, the latter are liable over the former.

§ 112, *Sur. Ct. A.* Former § 2582, *Code Civ. Pro.*

A person who has money of the deceased in his hands and is afterward appointed administrator is liable to pay same over to an executor on proof of a will, and his sureties are liable for his default. *Power v. Speckman*, 126 N. Y. 354.

Where a sole next of kin died before distribution leaving a husband and son, and the husband was appointed guardian of the son and received as such guardian a share of the estate which would have gone to his wife's administrators in the usual course, and he was afterward appointed administrator of his wife's estate and was asked to account for such money — *held*, that this section did not apply. *Matter of Maybee*, 40 Misc. Rep. 518, 82 N. Y. Supp. 809.

Where a person receives a fund belonging to the estate as an individual, the moment letters are issued to such person he holds such fund under the letters. *Power v. Speckman*, 126 N. Y. 354, 358; *Matter of Brintnall*, 40 Misc. Rep. 67.

¶ 124 Actions Upon Official Bonds of Public Officers, Including Trustees, Guardians, Executors, and Administrators.

Actions upon official bonds or undertaking.

Where a public officer is required to give an official bond or undertaking, to the people, and special provision is not made by law for the prosecution of the bond or undertaking, by or for the benefit of a person, who has sustained, by his default, delinquency, or misconduct, an injury, for which the sureties upon the bond or undertaking are liable, such a person may apply for leave to prosecute the delinquent's official bond or undertaking.* * *

§ 20, *Public Officers Law*. Former § 1888, *Code Civ. Pro*.

Executors (other than the public administrator) are not public officers within the meaning of this section. *Dunne v. Am. Surety Co.*, 43 App. Div. 91, 59 N. Y. Supp. 429.

Bonds, etc., to the people or a public officer for the benefit of a suitor.

Where a bond or undertaking has been given, as prescribed by law, in the course of an action or a special proceeding, to the people or to a public officer, for the benefit of a party or other person interested and provision is not specially made by law for the prosecution thereof; the party or other person so interested may maintain an action in his own name for a breach of the condition of the

bond, or of the terms of the undertaking; upon procuring an order granting him leave so to do. Notice of the application therefor must be given, as directed by the court or judge, to the persons interested in the disposition of the proceeds.

§ 159, *Civ. Pr. A.* Former § 814, *Code Civ. Pro.*

Bond to the people.

Though the bond of an administrator in form runs to the people in legal effect, it runs to those to whom the right of action thereon is given by statute.

Action upon a penal bond.

A bond in a penal sum, executed within or without the state, and containing a condition to the effect, that it is to be void, upon performance of any act, has the same effect, for the purpose of maintaining an action or special proceeding, or two or more successive actions or special proceedings thereupon, as if it contained a covenant to pay the sum, or to perform the act, specified in the condition thereof. But the damages to be recovered for a breach, or successive breaches, of the condition, cannot, exceed in the aggregate the penal sum, except where the condition is for the payment of money; in which case they cannot exceed the penal sum, with interest thereupon, from the time when the defendant made default in the performance of the condition.

§ 160, *Civ. Pr. A.* Former § 1915, *Code Civ. Pro.*

Actions upon the official bonds of executors, administrators, and guardians.

There are three classes of actions upon the official bonds of executors, administrators, and guardians, and each of them is independent of the others.

Sureties bound by decree.

Before 1894 it was not necessary to cite the sureties on a judicial settlement, and it has been repeatedly held that in such cases the sureties were bound by any decree made. Some of such cases follow:

The sureties on the bond of an administrator are bound by a judgment or decree against him, and such decree may be opened for fraud and a new one made charging the administrator with a larger amount, and the sureties are bound thereby without notice. *Deobold v. Oppermann*, 111 N. Y. 531.

The sureties are concluded by an unreversed decree of the surrogate and cannot attack it in an action brought against them on their bond. *Casoni v. Jerome*, 58 N. Y. 315.

The sureties on an administrator's bond are bound by the final decree, although they had no notice of the proceedings for an accounting. But the defense of fraud and collusion is always open to them. *Annett v. Terry*, 35 N. Y. 256; *Matter of Bodine*, 119 App. Div. 493.

Decrees made since the amendment to § 2728, Code Civ. Pro. in 1894.

In 1894 section 2728, Code Civ. Pro. (now § 260 Sur. Ct. A.) was amended providing that on a voluntary judicial settlement the sureties on an official bond should be cited. Thereafter it was held in *Cookman v. Stoddard*, 132 App. Div. 485; aff'd, 200 N. Y. 563, that an action could not be maintained upon an administrator's bond against the sureties if they had not been cited or had not appeared on the judicial settlement.

Prior accounting and default.

The general rule is that no action at law can be maintained against sureties until there has been an accounting and decree or order made establishing the default and the extent of the deficiency. *Rouse v. Payne*, 120 App. Div. 667, 105 N. Y. Supp. 549; revg. 53 Misc. Rep. 56; *Hood v. Hood*, 85 N. Y. 561; *Haight v. Brisbin*, 100 N. Y. 219.

There are exceptions to the rule that there must have been a prior accounting and default, and one is where it appears "that an accounting is impossible or impracticable" for the reason that the principal has absconded. *Kurz v. Hess*, 86 App. Div. 529, 83 N. Y. Supp. 773.

In *Otto v. Van Riper* (31 App. Div. 278; aff'd, 164 N. Y. 536) and in *Bischoff v. Engel* (10 App. Div. 240), it was held that where an administrator died in a foreign State wholly insolvent, without having accounted and where no representative of the deceased trustee had been appointed in this State, equity would intervene and furnish a remedy; that no accounting was necessary and that an action in equity to re-

cover of the surety without such an accounting could be maintained. Such an action being solely cognizable in a court of equity, the action is triable at Special Term. *Parker v. Dominick*, 105 App. Div. 440, 94 N. Y. Supp. 249.

An action cannot be maintained against the sureties on the bond of a deceased guardian until an accounting in court. *Perkins v. Stimmel*, 114 N. Y. 359; revg. 42 Hun, 520.

¶ 125 Action by Person Named in Decree, or by Person Aggrieved.

When bond may be prosecuted.

Where an execution, issued upon a surrogate's decree, against the property of an executor, administrator, testamentary trustee, or guardian, has been returned wholly or partly unsatisfied, an action to recover the sum remaining uncollected may be maintained upon his official bond by and in the name of the person in whose favor the decree was made. If the principal debtor is a resident of the state, the execution must have been issued to the county where he resides.

§ 113, *Sur. Ct. A.* Former § 2583, *Code Civ. Pro.*

When execution need not be issued. See ¶ 126.

With respect to the liabilities of the sureties in and for the purpose of maintaining an action upon decedent's official bond a decree rendered upon an accounting under section 257 has the same effect as if an execution issued upon a surrogate's decree against the property of the decedent had been returned unsatisfied during the decedent's lifetime. From § 114, *Sur. Ct. A.*

Proceedings when it is desired to enforce a decree by action against sureties.

A transcript of the decree should be obtained from the clerk of the Surrogate's Court, and the same should be sent to the county clerk of the county where the representative resides (§ 113) or may have known property, to be docketed (§ 81).

A transcript in this form has been held sufficient: "Against J. W. H—— in favor of C. S. H——, amount decreed to be paid \$51,000; time of filing Oct. 15, 1919." The transcript or judgment need not recite the representative character of the

person directed to pay, as it is immaterial because the execution runs against him personally. *Matter of Quackenbos*, 38 Misc. Rep. 66, 76 N. Y. Supp. 964; *In re Haaren*, 178 N. Y. Supp. 775, 109 Misc. Rep. 402; *In re Taber*, 132 App. Div. 495.

Execution should be issued thereon by the Surrogate who made the decree, to the Sheriff of the county in which the transcript is filed and the delinquent resides (§ 113), the same being made returnable to the Surrogate's Court. § 83. *Sperb v. McCoun*, 110 N. Y. 605.

Leave to issue the execution need not be applied for as § 151 Dec. Est. L., does not apply in such a case, as by § 83 the execution issues as of course. *Joll v. Ritterman*, 2 Dem. 242; *Peyser v. Wendt*, 2 Dem. 221.

The execution may run against the delinquent personally (id.)

Where the execution has been issued to the county of the residence of the principal debtor, if he is a resident of the State, and has been returned wholly or partly unsatisfied, an action may be maintained upon the bond (§ 113).

The decree is not affected by docketing.

The remedy by contempt proceedings and by action on the bond are concurrent and one or both may be pursued. *Townsend v. Whitney*, 75 N. Y. 425.

Action on decedents official bond.

Where the delinquent is dead, the decree itself has the same effect as issuing an execution. § 114. *Van Zandt v. Grant*, 175 N. Y. 150.

The person to whom the claim has been assigned may sue.

If none but the person in whose favor a decree is made can sue on an official bond under this section, the executor, administrator, trustee in bankruptcy, or general assignee for the benefit of creditors of such person cannot bring such a suit.

The language of section 113 should not be construed accord-

ing to the strict letter thereof; so that no person having an interest in the enforcement of the surrogate's decree can maintain an action upon the official bond of an administrator other than the person in whose favor the decree was made.

The section applied.

The death of a surety on the official bond of a nonresident executor does not relieve his estate from liability for the principal's after management of his trust. *Stevens v. Stevens*, 2 Dem. 469.

Where by the will there is a conversion of real estate the executor must account for the same and for rents and profits, and if he fails to do so the sureties on his bond are liable. *Hood v. Hood*, 85 N. Y. 561; *Stagg v. Jackson*, 1 id. 206.

On the giving of a bond by an executor who has become a nonresident, the sureties undertake that the executor will pay over all money ordered to be paid over, even though he did not have the money in his hands when the bond was given. *Scofield v. Churchill*, 72 N. Y. 565.

The sureties on the bond of a trustee who has been by a decree removed and directed to turn over funds in his hands, but who never after that comes into the State, may be sued for such default. *Yates v. Thomas*, 35 Misc. Rep. 552, 71 N. Y. Supp. 1113.

Sureties cannot escape liability for property claimed to have been transferred by an administrator to himself as guardian until they show such a transfer as will hold the sureties of the guardian. *Potter v. Ogden*, 136 N. Y. 384; aff'g, 65 Hun, 27, 47 N. Y. St. Repr. 190, 19 N. Y. Supp. 594.

The surety should be charged with interest on the misappropriated funds from the date of the decree, not from the date of the misappropriation. *Hood v. Hayward*, 124 N. Y. 1; modifying and aff'g, 48 Hun, 330, 15 N. Y. St. Repr. 846.

Guardian settled with infant and got extension of time to pay over balance due. Such settlement was set aside for fraud and an accounting had and decree made — *held*, that

the sureties on the guardian's bond were liable, and that one dying, his estate was liable. *Douglass v. Ferris*, 138 N. Y. 192; modifying and aff'g, 63 Hun, 413, 44 N. Y. St. Repr. 710, 18 N. Y. Supp. 685.

Action on official bond, when no successor appointed.

Where an executor, administrator, guardian or testamentary trustee has been removed, or his letters have been revoked, and no successor is appointed, any person aggrieved may, upon obtaining an order from the surrogate granting him leave so to do, maintain an action upon the official bond of the person so removed or whose letters have been revoked in behalf of himself and all others interested; in which the plaintiff may recover any money, or the full value of any other property, received by the principal on the bond, and not duly administered by him, and to the full extent of any injury sustained by the estate of the decedent, infant or beneficiary by any act or omission of the principal. The money recovered in such an action must be paid, by the sheriff or other officer who collects it, into the surrogate's court to be paid to a successor when appointed and distributed to the persons entitled thereto.

§ 115, *Sur. Ct. A.* Former § 2585, *Code Civ. Pro.*

The section applied.

An accounting as executor was had and a fund established which the executor was directed to invest as trustee, but the decree did not in terms discharge him as executor — *held*, that his sureties were liable for his subsequent acts as executor. *Cluff v. Day*, 124 N. Y. 195.

An action may be brought by an administrator *de bonis non* against the bond of his deceased predecessor for his wrongful conversion of property, without first issuing execution. *Dunne v. Af. Surety Co.*, 43 App. Div. 91, 59 N. Y. Supp. 429.

Administrator accounted and was decreed to pay guardian of infant his share of the estate. He was subsequently removed — *held*, that an action on his bond by the guardian did not require leave of court. *Prentiss v. Weatherly*, 68 Hun, 114, 52 N. Y. St. Repr. 80; aff'd, 144 N. Y. 707.

¶ 126 Action by Successor.

Successor may prosecute official bond.

Where a successor of an executor, administrator, guardian or testamentary trustee has been appointed, he may maintain an action upon his predecessor's

official bond, in which he may recover any money, or the full value of any other property, received by the principal in the bond, and not duly administered by him; and to the full extent of any injury, sustained by the estate of the decedent, infant or beneficiary as the case may be, by any act or omission of the principal.

The money recovered in such an action shall be part of the estate or fund in the hands of the successor and must be distributed or otherwise disposed of accordingly; except that a recovery for an act or omission, respecting a right of action, or other property, appropriated by law for the benefit of the husband, wife, family, or next of kin of a decedent, or disposed of by a will for the benefit of any person is for the benefit of the person or persons so entitled thereto.

A decree against such decedent's executor, or administrator, rendered upon an accounting under section 257 of this act, has the same effect as if an execution issued upon a surrogate's decree against the property of decedent had been returned unsatisfied during decedent's lifetime.

§ 114, *Sur. Ct. A.* Former § 2584, *Code Civ. Pro.*

“ Successor.”

The remedy given to such “ successor ” on the bond of his removed predecessor by section 114 is wholly distinct from and independent of the remedies conferred upon other persons on the bonds of executors, administrators, or guardians by other sections of the Surrogate's Court Act. *Hood v. Hayward*, 124 N. Y. 1; *Fassbender v. Am. Sur. Co.*, 66 Misc. Rep. 6, 122 N. Y. Supp. 442.

Where one of two executors has been removed the remaining executor is a “ successor ” within the meaning of this section. *Hood v. Hayward*, 124 N. Y. 1; modifying and aff'g, 48 Hun, 330, 15 N. Y. St. Repr. 846.

Execution.

Where there is an accounting and decree under section 257, it is not necessary to issue an execution before beginning an action on the bond. *Van Zandt v. Grant*, 175 N. Y. 150; aff'g, 67 App. Div. 70, 73 N. Y. Supp. 600.

Accounting.

An administrator *de bonis non* may prosecute the bond of a deceased administrator where his executor is a nonresident and will not submit to the jurisdiction of the court by an accounting or otherwise. *Dunne v. Am. Sur. Co.*, 34 Misc. Rep. 584, 70 N. Y. Supp. 391.

An action on the official bond of a deceased guardian may be maintained by the new guardian after a decree made on the accounting by the representative of the deceased guardian directing payment to such new guardian. *Van Zandt v. Grant*, 175 N. Y. 150; dis'g, *Perkins v. Stimmel*, 114 N. Y. 359; revg. 42 Hun, 520; *Prentiss v. Weatherly*, 68 Hun, 114, 52 N. Y. St. Repr. 80, 22 N. Y. Supp. 680; aff'd, 144 N. Y. 707.

In an action on the bond of a deceased general guardian it is not necessary for his successor to exhaust all remedies against the administrator of such guardian before proceeding against the sureties on the bond of the deceased guardian. *Van Zandt v. Grant*, 67 App. Div. 70; aff'd, 175 N. Y. 150.

¶ 127 How a Bond Given on Appeal or for the Performance of an Act May be Discharged.

Discharge of bond or undertaking given on appeal, or for the performance of an act.

Any party to a bond or undertaking given upon appeal, or to insure the performance of an act by himself or another, as to which no accounting is required by law for its discharge, may apply to the surrogate's court, upon notice to all parties interested in the subject matter, or in the proceeding in which the bond or undertaking was given, for the discharge of the obligation or liability, in whole or in part. The court may thereupon by order certify that the whole obligation or liability on the bond or undertaking is discharged, or may direct that such obligation or liability be discharged in such amount as may be just, and that the bond or undertaking shall thereafter have the same force and effect as if given in terms for the remaining obligation or liability.

§ 116, *Sur. Ct. A. Former § 2586, Code Civ. Pro.*

Heretofore there has been no proceeding by which a bond given on appeal or for the performance of a particular act could be discharged.

Application of this article to executors, et cetera, heretofore appointed.

The provisions of this article apply to an executor, administrator, or guardian, to whom letters have been issued, and to a testamentary trustee whose trust has been created before this act takes effect; except that it does not affect, in any manner, the liability of the sureties on a bond executed before this act takes effect.

§ 117, *Sur. Ct. A. Former § 2587, Code Civ. Pro.*

CHAPTER XXX.

Miscellaneous Provisions Regarding Actions by and Against Representatives. Care and Custody of Estates of Per- sons Sent to States Prison for Life.

- ¶ 128. Executors and administrators liable on civil contracts.
Must be brought in representative capacity.
- ¶ 129. Rights and liabilities transferred by death.
Death of party, action surviving.
- ¶ 130. Representative not summoned.
Joining causes of action.
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Decedent's property not bound by judgment.
- ¶ 131. Limitations and disabilities.
- ¶ 132. Actions for wrongs.
- ¶ 133. Care and custody of estates of persons sentenced to prison for life.

¶ 128 Actions at Law by and Against Executors and Administrators.

While executors and administrators represent those interested so that proceedings may be brought without joining the numerous other persons in most instances, care should be taken to distinguish between cases involving mere questions of administration and cases involving an attack upon the rights of the persons interested. In the latter case it is safer to make all such persons whose rights are to be affected, parties to the action. *Riggs v. Crugg*, 89 N. Y. 479, 488.

Actions by and against executors.

Actions of account, and all other actions upon contract, may be maintained by and against executors in all cases in which the same might have been maintained by or against their respective testators. § 116, *Decedent Estate Law*.

Administrators' rights and liabilities.

Administrators shall have actions to demand and recover the debts due to their intestate and the personal property and affects of their intestate; and shall answer and be accountable to others to whom the intestate was holden or bound in the same manner as executors. § 117, *Decedent Estate Law*.

Liability of executors, etc., on promises.

No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate, out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, be in writing and signed by such executor or administrator or by some other person by him thereunto specially authorized.

§ 113, *Decedent Estate Law*.

Executor and administrator; how to sue or be sued.

An action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding, hereafter commenced against him, except where it is brought to charge him personally, must be brought by or against him in his representative capacity.

§ 140, *Dec. Est. L.* Former § 1814, *Code Civ. Pro.*

Party in interest to sue, trustee, etc., may sue alone.

Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted.

§ 210, *Civ. Pr. A.* Former § 449, *Code Civ. Pro.*

This section did not change the existing rule in respect to party in interest. *Thompson v. Whitmarsh*, 100 N. Y. 35.

Person sued in a representative capacity, not to be arrested.

A person prosecuted in a representative capacity, as heir, executor, administrator, legatee, devisee, next of kin, assignee, or trustee, cannot be arrested, as prescribed in this and the next article, except for his personal act.

§ 831, *Civ. Pr. A.* Former § 555, *Code Civ. Pro.*

May maintain action on promise to pay debt.

An executor or administrator may maintain an action on a promise to pay the debt due an estate either as such representative or individually. *Bingham v. Marine Nat. Bank*, 41 Hun, 377; *aff'd*, 112 N. Y. 661; *Spies v. Michelsen*, 2 App. Div. 226, 73 N. Y. St. Repr. 394. See also 15 Misc. Rep. 414, 71 N. Y. St. Repr. 785, 36 N. Y. Supp. 619.

May appear in suit.

An executor sued as such and individually may appear in each capacity by a different attorney. *Roche v. O'Connor*, 95 App. Div. 496, 88 N. Y. Supp. 968.

Section 140 Decedent Estate Law has not changed the settled rule that contracts of executors and administrators for services to be rendered are their personal contracts and do not bind the estate. *Parker v. Day*, 155 N. Y. 383; revg. 12 Misc. Rep. 510, 67 N. Y. St. Repr. 378; which revd. 9 Misc. Rep. 298.

Administrators deposited estate money in a bank and took a certificate — *held*, that an action to recover the amount thereof brought in their representative capacity would be upheld. *Bingham v. Marine Nat. Bank*, 112 N. Y. 661; aff'g, 41 Hun, 377.

“Cause of action belonging to him in his representative capacity” means a cause of action which accrued during the lifetime of deceased or is founded upon a contract made by him. *Buckland v. Gallup*, 105 N. Y. 453; aff'g, 40 Hun, 61.

An action upon a claim due the estate should be brought in the name of the executor as such, and not in his individual capacity. *Hone v. De Peyster*, 106 N. Y. 645; revg. 44 Hun, 487.

An executor who deposited bonds of the estate with a bank may sue in his own name to recover possession of them. *Van Buren v. First Nat'l Bank*, 53 App. Div. 80, 65 N. Y. Supp. 703; aff'd, 169 N. Y. 610.

An administrator may sue on a contract regarding the real estate of the deceased which he himself made. *Loew v. Christ*, 13 App. Div. 624, 42 N. Y. Supp. 963, 76 N. Y. St. Repr. 963.

Collection of foreign claim.

The question of interest is tested not by any beneficial right which a person may have to the proceeds of a recovery, but by his possession of the legal title to the cause of action (*Eaton v. Alger*, 47 N. Y. 345; *Sheridan v. New York*, 68 N. Y. 30), and it is the irrefragable law of this State that the administrator, when appointed, succeeds to the legal title of his intestate's personal estate of whatever kind, and that he only is authorized to employ all lawful means to reduce it to his possession. With regard to a debt due from a resident or

from a domestic corporation to a nonresident decedent, it is expressly provided (§§ 45, 47) that the debt shall be deemed personal property to be administered upon within this State. True, the administrator is bound eventually to account for and to distribute the surplus assets to those ultimately entitled thereto under the foreign law, but any right to such surplus is subordinate to the administrator's legal title, with which he is invested for the purposes of administration. *Homans v. N. Y. Life Ins. Co.*, 55 Misc. Rep. 574.

¶ 129 Regulations Concerning Actions and Special Proceedings When Rights or Liabilities are Transferred by Death.

Action when not to abate.

An action does not abate by any event, if the cause of action survives or continues. A special proceeding does not abate by any event, if the right to the relief sought in such special proceeding survives or continues.

§ 82, *Civ. Pr. A.* Former § 755, *Code Civ. Pro.*

This section formerly did not apply to Surrogate's Court, and, therefore, a proceeding in that court abated on the death of a sole party. *Matter of Schlesinger*, 36 App. Div. 77, 55 N. Y. Supp. 514; revg. 24 Misc. Rep. 456, 53 N. Y. Supp. 710.

But where the party dying is one of two or more executors or administrators, the proceeding may be continued by the other and a decree of distribution made, but not a personal decree against the one so dying. Section 93 provides for the continuance by the executor or administrator surviving. *Matter of Steencken*, 51 App. Div. 418, 64 N. Y. Supp. 660.

Death, etc., of public officer or trustee.

Where an action or special proceeding is authorized or directed by law, to be brought by or in the name of a public officer, or by a receiver, or other trustee, appointed by virtue of a statute, his death or removal does not abate the action or special proceeding; but the same may be continued by his successor, who, upon his application, or that of a party interested, must be substituted for that purpose, by the order of the court, a copy of which must be annexed to the judgment-roll.

§ 90, *Civ. Pr. A.* Former § 766, *Code Civ. Pro.*

Proceedings when part of cause of action survives.

In case of the death of one of two or more plaintiffs, or one of two or more defendants, if part only of the cause of action, or part of some of two or more distinct causes of action, survives to or against the others, the action may proceed, without bringing in the successor to the rights or liabilities of the deceased party; and the judgment shall not affect him, or his interest in the subject of the action. Where it appears proper so to do, the court may require or compel the successor, or a person who claims to be the successor, to be brought in as a party, upon his own application or upon the application of a party to the action.

§ 86, *Civ. Pr. A.* Former § 759, *Code Civ. Pro.*

Judgment of foreclosure entered before death of mortgagor.

Where judgment of foreclosure and sale has been entered and thereafter the mortgagor dies, the court may order enforcement of it without reviving it against his heirs or representatives. *Wing v. De La Rionda*, 125 N. Y. 678; *Hays v. Thomas*, 56 id. 521.

Proceedings when sole party dies and action survives.

In case of the death of a sole plaintiff or a sole defendant, if the cause of action survives or continues, the court, upon a motion, must allow or compel the action to be continued, by or against his representative or successor in interest. In case of the death of a sole party to a special proceeding, if the right to the relief sought in such proceedings survives or continues, the court upon a motion, must allow or compel such proceeding to be continued by or against his representative, or successor in interest. This provision as to a special proceeding does not apply where provision for such continuance has been otherwise made by law.

§ 84, *Civ. Pr. A.* Former § 757, *Code Civ. Pro.*

Proceedings upon transfer of interest, or devolution of liability.

In case of a transfer of interest, or devolution of liability, the action may be continued by or against the original party; unless the court directs the person, to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires.

§ 83, *Civ. Pr. A.* Former § 756, *Code Civ. Pro.*

A trust of personal estate does not terminate instantly on the death of the beneficiary, but the trustee continues for the purpose of winding up the affairs, and a suit may be continued without substitution of new parties. *Farmers' Loan & T. Co. v. Pendleton*, 115 App. Div. 506. See also 179 N. Y. 486.

Proceedings; when one of several parties dies.

In case of the death of one of two or more plaintiffs, or one of two or more defendants, if the entire cause of action survives to or against the others, the action may proceed in favor of, or against the survivors. The estate of a person or party jointly liable upon contract with others, however, shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary so to do for the proper disposition of the matter; and, where the liability is several as well as joint, may order a severance of the action so that it may proceed separately against the representative of the decedent, and against the surviving defendant or defendants.

§ 85, *Civ. Pr. A.* Former § 758, *Code Civ. Pro.*

¶ 130 Joint and Several Liability; Pleading Counterclaims and Want of Assets.**Regulations, when some of the executors, etc., are not summoned.**

In an action or special proceeding against two or more executors or administrators, representing the same decedent, all are considered as one person; and those who are first served with process, or first appear, must answer the plaintiff. Separate answers, by different executors or administrators, cannot be required or allowed, except by direction of the court. Judgment in favor of the plaintiff may be entered, and, in a proper case, execution may be issued against all the defendants, as if all had appeared. But this section does not affect the plaintiff's right to bring into court all the executors or administrators who are parties.

§ 143, *Dec. Est. L.* Former § 1817, *Code Civ. Pro.*

This section does not change the rule that in an action for or against executors all the qualified and acting executors must be made parties. *Simpson v. Simpson*, 44 App. Div. 492, 60 N. Y. Supp. 879.

The appearance in an action by one executor binds both. *Montgomery v. Boyd*, 78 App. Div. 64, 79 N. Y. Supp. 879.

Executors who have not qualified, not necessary parties.

One of two or more executors, to whom letters testamentary have not been issued, is not a necessary party to an action or special proceeding, in favor of or against the executors, in their representative capacity.

§ 144, *Dec. Est. L.* Former § 1818, *Code Civ. Pro.*

Where only one foreign representative takes letters here, the other is not a necessary party to an action. *Lawrence v. Townsend*, 88 N. Y. 24.

Action against executor, etc., who has been superseded.

If an executor or administrator is defendant in an action or special proceeding, pending when his powers cease, the plaintiff may, in a proper case, proceed therein against him, to charge him personally; but a judgment or other determination, thereafter rendered or made against him, is not of any force as against the estate of the decedent, or a person succeeding to the administration thereof.

§ 155, *Dec. Est. L.* Former § 1830, *Code Civ. Pro.*

When personal and representative causes of action may be joined.

An action may be brought against an executor or administrator, personally, and also in his representative capacity, in either of the following cases:

1. Where the complaint sets forth a cause of action against him in both capacities, or states facts, which render it uncertain, in which capacity the cause of action exists against him.

2. Where the complaint sets forth two or more causes of action against the defendant, in different capacities, all of which grow out of the same transaction, or transactions connected with the same subject of action; do not require different places or modes of trial; and are not inconsistent with each other.

In a case specified in this section, a judgment for the plaintiff for a sum of money must distinctly show, whether it is awarded against the defendant personally, or in his representative capacity.

§ 141, *Dec. Est. L.* Former § 1815, *Code Civ. Pro.*

Action against an executor who was also sole surviving partner maintained. *Simpson v. Simpson*, 44 App. Div. 492, 60 N. Y. Supp. 879.

Action against widow who was sole administratrix and sole devisee maintained. *Decrano v. Moore*, 30 Misc. Rep. 303, 63 N. Y. Supp. 585; modified and aff'd, 50 App. Div. 361, 64 N. Y. Supp. 3.

Demurrer sustained on account of joining causes of action against the representative and the representative as an individual. *Taggart v. Francis Draz & Co.*, 150 N. Y. Supp. 41, 166 App. Div. 381.

Personal and representative cause of action; separate dockets and executions.

In a case specified in the last section, or where costs to be collected out of the individual property of an executor or administrator, are awarded in an action by or against him in his representative capacity, so much of the judgment, as awards a sum of money against him personally, may be separately docketed, and a separate execution may be issued thereupon, as if the judgment contained no award against him in his representative capacity.

§ 142, *Dec. Est. L.* Former § 1816, *Code Civ. Pro.*

Counterclaim, when defendant is sued in a representative capacity.

In an action against an executor or an administrator, or other person sued in a representative capacity, the defendant may set forth, as a counterclaim, a demand belonging to the decedent, or other person whom he represents, where the person so represented would have been entitled to set forth the same, in an action against him. § 268, *Civ. Pr. A.* Former § 505, *Code Civ. Pro.*

An administrator of the mortgagee sought to foreclose a mortgage against the administrator of the mortgagor—*held* that a claim against the deceased could be set up as a counterclaim and adjusted and thus determine the amount due on the mortgage. *Thornton v. Moore*, 26 Misc. Rep. 120, 56 N. Y. Supp. 1100; *aff'd*, 41 App. Div. 617, 58 N. Y. Supp. 1150.

An executor who has taken assignments of judgments cannot set them up as counterclaims in an action brought against him as executor. *Weeks v. O'Brien*, 25 App. Div. 206, 49 N. Y. Supp. 344; *rev'd*, 20 Misc. Rep. 48, 45 N. Y. Supp. 740.

Must have been due before the death of deceased to be pleaded as a counterclaim. *Jordan v. Nat. Shoe & L. Bank*, 74 N. Y. 467; *Peyman v. Bowery Nat. Bank*, 14 App. Div. 432, 43 N. Y. Supp. 826.

Counterclaim when plaintiff is an executor or administrator.

In an action brought by an executor or administrator, in his representative capacity, a demand against the decedent, belonging at the time of his death, to the defendant, may be set forth by the defendant as a counterclaim, as if the action had been brought by the decedent in his lifetime; and, if a balance is found to be due to the defendant, judgment must be rendered therefor against the plaintiff, in his representative capacity. Execution can be issued upon such a judgment, only in a case where it could be issued upon a judgment in an action against the executor or administrator.

§ 269, *Civ. Pr. A.* Former § 506, *Code Civ. Pro.*

The executor sold assets on credit and a debtor to the estate sought to set off a claim against the estate—*held* that the executor personally was the real party in interest and the debt could not be offset. *Thompson v. Whitmarsh*, 100 N. Y. 35.

Must have been due before the death of deceased to be

pleaded as a counterclaim. *Jordan v. Nat. Shoe & L. B.*, 74 N. Y. 467; *Peyman v. Bowery Nat. Bank*, 14 App. Div. 432, 43 N. Y. Supp. 826.

Where a note was procured to be discounted by fraud — held, that it could be set up as a counterclaim although it matured after decedent's death. *Peyman v. Bowery Nat. Bank*, 14 App. Div. 432, 43 N. Y. Supp. 826.

Want of assets not to be pleaded by executor, etc.

In an action against an executor or administrator, in his representative capacity, wherein the complaint demands judgment for a sum of money, the existence, sufficiency, or want of assets, shall not be pleaded by either party; and the plaintiff's right of recovery is not affected thereby, except with respect to the costs to be awarded, as prescribed by law. A judgment in such an action is not evidence of assets in the defendant's hands.

§ 150, *Dec. Est. L.* Former § 1824, *Code Civ. Pro.*

Evidence of lack of assets not admissible. *Beardslee v. Hemingway*, 65 Hun, 400, 47 N. Y. St. Repr. 922.

False pleading by executor, etc.

An executor or administrator cannot be made personally liable to the adverse party, for a debt or for damages, by reason of his having made a false allegation in pleading.

§ 156, *Dec. Est. L.* Former § 1831, *Code Civ. Pro.*

Decedent's real property not bound by judgment against executor, etc.

Real property, which belonged to a decedent, is not bound, or in any way affected, by a judgment against his executor or administrator, and is not liable to be sold by virtue of an execution issued upon such a judgment, unless the judgment is expressly made, by its terms, a lien upon specific real property therein described, or expressly directs the sale thereof.

§ 149, *Dec. Est. L.* Former § 1823, *Code Civ. Pro.*

Judgment against executors not a lien upon land. *Platt v. Platt*, 105 N. Y. 488; *Lichtenberg v. Herdtfelder*, 103 id. 302; aff'g, 33 Hun, 57.

¶ 131 General Rules as to Limitations and Disabilities Affecting Actions and Special Proceedings by and Against Representatives. See ¶ 219.

Limitation in case of death without the state.

If a person, against whom a cause of action exists, dies without the state, the time which elapses between his death, and the expiration of eighteen months after the issuing, within the state of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator.

§ 12, *Civ. Pr. A.* Former § 391, *Code Civ. Pro.*

When a person entitled, etc., dies before limitation expires.

If a person, entitled to maintain an action, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative, after the expiration of that time, and within one year after his death.

§ 20, *Civ. Pr. A.* Former § 402, *Code Civ. Pro.*

Effect of death of person liable.

The term of eighteen months after the death, within the state, of a person against whom a cause of action exists, or of a person who shall have died within sixty days after an attempt shall have been made to commence an action against him pursuant to the provisions of this article, is not a part of the time limited for the commencement of an action against his executor or administrator. If letters testamentary or letters of administration upon his estate are not issued within this state, at least six months before the expiration of the time to bring the action, as extended by the foregoing provision of this section, the term of one year after such letters are issued, is not a part of the time limited for the commencement of such an action.

§ 21, *Civ. Pr. A.* Former part of § 403, *Code Civ. Pro.*

Effect of pending action involving decedent's estate.

The time during which an action is pending in a court of record between a person or persons and an executor or administrator, wherein the person or persons claim to recover from the executor or administrator any money or other property claimed by said executor or administrator to belong to the estate of the decedent, or embraced in the inventory of the assets of said decedent's estate, is not a part of the time limited for the commencement of an action against an executor or administrator, for a claim against the estate of the decedent until the final determination of the action brought to recover said or other property claimed by said executor or administrator to belong to said decedent's estate:

1. Where the claim against the estate of the decedent is liquidated by the recovery of a judgment thereon against an executor or administrator in an action in a court of record after trial on the merits, or by judicial settlement in surrogate's court.

2. Where a legatee brings an action, or institutes a proceeding, against an executor or administrator with the will annexed, to enforce the payment of a legacy.

§ 22, *Civ. Pr. A.* Part of former § 403, *Code Civ. Pro.*

Letters deemed issued within six years; cause of action accruing between the death of a testator or intestate, and the grant of letters. See ¶ 219.

For the purpose of computing the time, within which an action must be commenced in a court of the state, by an executor or administrator, to recover personal property, taken after the death of a testator or intestate, and before the issuing of letters testamentary or letters of administration; or to recover damages for taking, detaining or injuring personal property within the same period; the letters are deemed to have been issued within six years after the death of the testator or intestate. But where an action is barred by this section, any of the next of kin, legatees, or creditors, who, at the time of the transaction upon which it might have been founded, was within the age of twenty-one years, or insane, or imprisoned on a criminal charge, may, within five years after the cessation of such a disability, maintain an action to recover damages by reason thereof; in which he may recover such sum, or the value of such property, as he would have received upon the final distribution of the estate, if an action had been seasonably commenced by the executor or administrator.

§ 57, *Civ. Pr. A.* Former § 392, *Code Civ. Pro.*

Exceptions as to persons under disabilities.

If a person, entitled to maintain an action other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, is, at the time when the cause of action accrues, either:

1. Within the age of twenty-one years; or,

2. Insane; or,

3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life;

The time of such disability is not a part of the time limited in this article for commencing the action; except that the time so limited cannot be extended more than five years by any such disability, except infancy; or, in any case more than one year after the disability ceases.

§ 60, *Civ. Pr. A.* Former § 396, *Code Civ. Pro.*

Where a petition for an accounting is presented on behalf of an infant the Statute of Limitations is not a good defense. *Matter of Pond*, 40 Misc. Rep. 66, 81 N. Y. Supp. 249.

Disability must exist when right accrues.

A person cannot avail himself of a disability unless it existed when his right of action or of entry accrued.

§ 28, *Civ. Pr. A.* Former § 408, *Code Civ. Pro.*

If several disabilities, no limitation until all removed.

Where two or more disabilities co-exist, when the right of action or of entry accrues, the limitation does not attach, until all are removed.

§ 29, *Civ. Pr. A.* Former § 409, *Code Civ. Pro.*

When cause of action accrues on a current account. See ¶ 430.

In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item, proved in the account on either side. § 56, *Civ. Pr. A.* Former § 386, *Code Civ. Pro.*

Where there was a running account for board, a payment keeps alive all items for six years prior to the payment, and it is error to limit the recovery to six years prior to the debtor's death. *Gilbert v. Comstock*, 93 N. Y. 484.

Actions not before provided for.

An action, the limitation of which is not specially prescribed in this article, must be commenced within ten years after the cause of action accrues.

§ 53, *Civ. Pr. A.* Former § 388, *Code Civ. Pro.*

Where an executor accounted and some estate was left in his hands, and no proceeding was instituted for a further accounting for more than ten years — *held*, that the ten years' statute was a bar. *Matter of Smith*, 66 App. Div. 340, 72 N. Y. Supp. 1062.

¶ 132 Actions for Wrongs, By or Against Executors and Administrators.

For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or after his death, by his executors or administrators against such wrongdoer, and after his death against his executors or administrators, in the same manner and with the like effect in all respects, as actions founded upon contracts. This section shall not extend to an action for personal injuries, as such action is defined in section 3343, *Code Civ. Pro.*; except that nothing herein contained shall affect the right of action now existing to recover damages for injuries resulting in death. § 120, *Decedent Estate Law.*

Executors, etc., may maintain actions for trespass.

Executors and administrators shall have actions of trespass against any person who shall have wasted, destroyed, taken, or carried away, or converted to his

own use, the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on the real estate of the deceased in his lifetime. § 118, *Decedent Estate Law*.

Trespass against executors, etc.

Any person, or his personal representatives, shall have actions of trespass against the executor or administrator of any testator or intestate, who in his lifetime shall have wasted, destroyed, taken, or carried away, or converted to his own use the goods or chattels of any such person, or committed any trespass on the real estate of any such person. § 119, *Decedent Estate Law*.

Liability of executors, etc., for waste or conversion.

The executors and administrators of every person, who, as executor, either of right or in his own wrong, as administrator, shall have wasted or converted to his own use, any goods, chattels, or estate, of any deceased person, shall be chargeable in the same manner, as their testator or intestate would have been, if living. § 114, *Decedent Estate Law*.

Executors de son tort abolished.

No person shall be liable to an action as executor of his own wrong, for having received, taken or interfered with, the property or effects of a deceased person; but shall be responsible as a wrongdoer in the proper action to the executors, or general or special administrators, of such deceased person, for the value of any property or effects so taken or received, and for all damages caused by his acts, to the estate of the deceased. § 112, *Decedent Estate Law*.

¶ 133 Care and Custody of the Estates of Persons Sentenced to State Prison for Life.

Whenever any person has been convicted and sentenced to imprisonment in this state for life, the husband, wife, relatives or next of kin or any creditor of such person may apply to the supreme court, at a special term thereof in the judicial district in which said person resided at the time of his conviction for the appointment of a committee of such person's estate, both real and personal. § 370, *Prison Law*.

Notice of application for committee to be given.

Such applications shall be made upon personal notice of not less than twenty days to such convicted person and to the district attorney of the county where the conviction was had, and upon notice to such other persons as would be entitled to notice of application for the probate of the will of such convicted person if he were then dead leaving a will of real and personal property, to be given in like manner as notice of application for such probate. The application shall, among other things, set forth the amount of the property of such person, and the names and residence of his heirs-at-law and next of kin, as near as the same

are known or can be ascertained by the applicant. Upon such application and due proof of the service of the notice herein required, the court may, in its discretion, appoint a committee of the estate of such convicted person. The person or persons so appointed as such committee shall file a bond in the county clerk's office of such county, and in such an amount and with such sureties as the said court shall direct. A copy of the order appointing such committee certified by the clerk of the county in which the order is filed, shall be filed in every county in which any real estate of such convicted person is situated. * § 371, *Prison Law*.

A person sentenced to imprisonment for life is thereafter deemed civilly dead.

§ 511, *Penal Law*.

For a discussion of the effect of civil death upon property rights, see *Avery v. Everett*, 110 N. Y. 317.

Payment of debts.

The court shall direct the payment of the debts of such convicted person from said property, and may also in its discretion direct the application of the income, and if need be, of the principal of such property, to the support, education and maintenance of such persons as the said convicted person would be legally liable to support if he had not been so convicted. Or the court may direct the care and preservation of the income and principal of such estate until the natural death of the person so convicted.

§ 372, *Prison Law*.

Court may direct sale.

The court may from time to time, in the manner prescribed by the code of civil procedure upon the sale of the property of an infant, if it deems it necessary, or that the estate will be benefited thereby, direct the sale of any of the real or personal property by said committee, and the investment of the proceeds of such sale. The court shall control said committee in the performance of his duties; and may from time to time modify and alter its direction or orders in any matter pertaining to the estate.

§ 373, *Prison Law*.

Annual account.

The committee so appointed shall annually render an account to the court of his management and of his receipts and disbursements, and transmit a copy thereof to the person so convicted. The court may grant such compensation to the committee as it deems proper, not exceeding, however, the amount that may be allowed to an administrator.

§ 374, *Prison Law*.

Transfer of property on pardon.

Should said convicted person be pardoned, or his sentence be commuted, the court shall direct the committee to transfer to him, after his discharge from prison, all of said property remaining in his hands not lawfully applied or used as herein provided for, and upon the death of such convicted person not pardoned or commuted as aforesaid the court shall direct the distribution of such property as upon the natural death of a person not convicted.

§ 375, *Prison Law*.

CHAPTER XXXI.

Fees of Appraisers, Referees, Jurors and Witnesses; Commissions and Compensation Allowed to Executors, Administrators, Guardians and Testamentary Trustees.

- ¶ 134. § 284. Fees of appraisers, referees, jurors, witnesses and printers.
- ¶ 135. § 285. Commissions, at what rate.
- ¶ 136. On what property or values computed.
- ¶ 137. Commissions to representative of deceased official.
- ¶ 138. Commissions to temporary administrator.
- ¶ 139. Compensation in addition to commissions.
- ¶ 140. § 285. Compensation when executor, etc., is also attorney.
- ¶ 141. When commissions may be denied.
- ¶ 142. § 285. Compensation fixed by the will.
- ¶ 143. When and under what law commissions are due and payable; not assignable.
- ¶ 144. Compensation on removal or resignation, and to successor.
- ¶ 145. Commissions both as executor and trustee.
- ¶ 146. Estates of more than \$100,000.
- ¶ 147. Commissions upon income.
- ¶ 148. Commissions when trust vests in supreme court.

¶ 134 Fees of Appraiser, Referee, Juror and Witness.**Fees of appraiser, referee, juror and witness.**

An appraiser is entitled, in addition to his actual expenses, to a sum, to be fixed by the surrogate, not exceeding five dollars for each day actually and necessarily occupied by him in making the appraisal or inventory. The number of days' service and the expenses, if any, must be proved by the affidavit of the appraiser; and the sums payable therefor taxed by the surrogate, and paid by the executor or administrator.

A referee, juror, or witness is entitled to the same fees for his services and for traveling, as are allowed for like services in the supreme court.

§ 284, *Sur. Ct. A.* Former § 2752, *Code Civ. Pro.*

Fees of appraisers, their taxation and payment.

The appraisers shall be entitled to receive a reasonable compensation for their services, to be allowed by the surrogate, not exceeding for each the sum of \$5 for each day actually employed in making appraisement, in addition to expenses actually and necessarily incurred.

The number of days' services rendered and the amount of such expenses must be verified by the affidavit of the appraiser, delivered to the executor or administrator and adjusted by the surrogate before payment of the fees.

It is not customary or necessary to give notice of the application to the surrogate for taxation of the fees. The executor or administrator represents the persons interested.

The order fixing the fees affects a substantial right, and any party interested may appeal from it.

Where the persons interested have not had notice of the taxation of appraisers' fees, the surrogate should grant a motion to set aside the taxation and grant a hearing. *Matter of Harriot*, 145 N. Y. 540; revg. 63 N. Y. St. Repr. 871, 30 N. Y. Supp. 1132.

An allowance of \$250 where the items were few and the work was not complicated disapproved, even though the estate was large. *Matter of Harriot*, 145 N. Y. 540.

The blank inventory furnished by some surrogates' offices contains the affidavit of the appraisers as to time spent and disbursements.

Referee's fees generally.

A referee, in an action or a special proceeding brought in a court of record, or in a special proceeding supplementary to an execution against property, is entitled to ten dollars for each day spent in the business of the reference; unless at or before the commencement of the trial or hearing, a different rate of compensation is fixed, by the consent of the parties other than those in default for failure to appear or plead, manifested by an entry in the minutes of the referee, or otherwise in writing, or a smaller compensation is fixed by the court or judge in the order appointing him.

§ 1545, *Civ. Pr. A.* Former § 3296, *Code Civ. Pro.*

See paragraph 15 where referee's fees are considered.

Witnesses' fees generally.

A witness in an action or a special proceeding, attending before a court of record, or a judge thereof, is entitled, except where another fee is specially prescribed by law, to fifty cents for each day's attendance; and, if he resides more than three miles from the place of attendance, to eight cents for each mile, going to the place of attendance. § 1539, *Civ. Pr. A.* Former § 3318, *Code Civ. Pro.*

Fees of person cited to be examined in discovery proceedings.

When a certified copy of the order is served the person ordered to appear must be paid the witness fee. § 205, ¶ 185.

Witnesses' fees on deposition to be used in another state.

A witness, attending before a commissioner or an officer, authorized to take his deposition, to be used without the state, in a case other than one * * *, is entitled to two dollars for each day's actual attendance, and to eight cents for each mile, going to the place of attendance.

§ 1540, *Civ. Pr. A.* From former § 3319, *Code Civ. Pro.*

Fees of trial jurors.

A trial juror, in an action or a special proceeding, in a court of record, is entitled, except as otherwise specially prescribed by or pursuant to statute in a particular court, or a particular county, to the following fees: twenty-five cents for each cause in which he is empanelled, to be paid by the party noticing the cause for trial; or, if it is noticed by more than one party, by the party whom the court directs to pay it. § 1542, *Civ. Pr. A.* Former § 3313, *Code Civ. Pro.*

Fees of printers.

Except as otherwise specially prescribed by law, the proprietor of a newspaper is entitled, for publishing summons, notice, order or other advertisement, required by law to be published, other than the session laws, for each inch of agate twenty-nine ems to the line, to seventy-five cents for the first insertion, and fifty cents for each subsequent insertion. In counties containing wholly or partially cities of the second class, the proprietor of a newspaper is entitled for publishing such notices, matters and advertisements aforesaid, other than the session laws for each inch of agate twenty-nine ems to the line, to one dollar and twenty-five cents for the first insertion, and one dollar for each subsequent insertion; and in all cities of the first class to twenty cents per agate line of twenty-nine ems for each insertion. If such notices, matters and advertisements aforesaid, other than the session laws, are printed in type other than agate, the proprietor of a newspaper shall be entitled to the number of inches such notices, matters and advertisements would occupy if set in agate twenty-nine ems to the line.

§ 1551, *Civ. Pr. A.* Former § 3317, *Code Civ. Pro.*

¶ 135 Commissions Allowed to Executors, Administrators, Guardians and Testamentary Trustees for Their Services; and Allowance for Personal Expenses.

The compensation for the personal services of all representatives, guardians and trustees is measured by the amount in value of the estate which passes through their hands, and not by the extent and value of the services themselves. Such

positions are considered as trusts to be undertaken for other reasons than those of money getting, and except in large estates the commissions allowed furnish no inducement for a person to seek the office.

In addition to the commissions for services the accounting party may be allowed his necessary personal disbursements made in and about the business of the estate.

Commissions of executor, administrator, guardian or testamentary trustee.

On the settlement of the account of any executor, administrator, guardian or testamentary trustee, the surrogate must allow to him his just, reasonable and necessary expenses actually paid by him, and if he be an attorney and counsellor-at-law of this state, and shall have rendered legal services in connection with his official duties, such compensation for such legal services as shall appear to the surrogate to be just and reasonable; and in addition thereto the surrogate must allow to such executor, administrator, guardian or testamentary trustee for his services in such official capacity, and if there be more than one, apportion among them according to the services rendered by them respectively.

For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five per centum.

For receiving and paying out any additional sums not amounting to more than ten thousand dollars, at the rate of two and one-half per centum.

For all sums above eleven thousand dollars, at the rate of one per centum.

The value of any real or personal property, to be determined in such manner as the surrogate may direct, and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions. But this shall not apply in case of a specific legacy or devise.

In addition to the compensation hereinbefore provided the court in its discretion may allow to a guardian of the person a sum of money to be fixed by it and paid by the guardian of the property out of the funds in his hands, which sum shall be for services of such guardian of the person up to the time of such allowance.

If an executor acting as trustee, or if a trustee or guardian, is required to receive income and pay over the same, and such executor, trustee or guardian pays over said income and renders an annual account to the beneficiary of all his receipts and disbursements on account thereof, he shall be allowed, and may retain, the same commission on the amount so accounted for as he would be allowed upon principal on a judicial settlement; if he does not render such annual account, he shall be allowed, upon his judicial settlement, his commissions upon the total income from any money or property then payable to such beneficiary.

If the gross value of the principal of the estate or fund accounted for amounts to one hundred thousand dollars or more, each executor, administrator, guardian or testamentary trustee is entitled to the full compensation on principal and income allowed herein to a sole executor, administrator, guardian or testamentary trustee, unless there are more than three, in which case the compensa-

tion to which three would be entitled must be apportioned among them according to the services rendered by them, respectively. Where the will provides a specific compensation to an executor, administrator, guardian or testamentary trustee, he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, within four months from the date of his letters, or in the case of a testamentary trustee or guardian, from the date of his filing his oath, he renounces the specific compensation. Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters testamentary or letters of general administration, are issued to a person who has been previously appointed a temporary administrator, he is entitled to compensation in one capacity only, at his election, except that where he has received compensation in one capacity he is entitled to the excess, if any, of the compensation allowed by law, above the sum which he has already received in the other capacity.

§ 285, *Sur. Ct. A.* Former § 2753, *Code Civ. Pro.*

Amendments.

The latest amendment to this section adds a provision that the surrogate may allow compensation to the guardian of the person of an infant for his services in acting as such guardian, the allowance to be paid by the guardian of the property.

Increment.

After some verbal changes, the increment of real and personal property may be included in computing commissions.

A provision in the first part of the section permits an executor, administrator, guardian or testamentary trustee who acts as his own attorney to receive such compensation for legal services performed by him as the surrogate allows. See ¶ 140.

Annual income.

The authority for allowing commissions on annual income which heretofore has been doubtful by reason of many conflicting decisions, is inserted here in an endeavor to settle the rule. Provision is also made for allowing commissions on property distributed in kind. See §§ 214, 268. ¶ 225.

Testamentary trustees.

Former section 3320, *Code Civ. Pro.*, which dealt with the subject of commissions of trustees, has now been changed so

that it does not apply to testamentary trustees. § 1548, Civ. Pr. A.

The distinction which has been made between that section and former sections 2730 and 2753 in its application to commissions to trustees is that under section 3320 commissions were to be computed on all sums of "principal" while under former sections 2730 and 2753 they were computed on all sums of "money." The language of former section 2730 was retained in section 2753, but there was added a provision that the value of real or personal property distributed or delivered should be considered as money in making computation of commissions.

Surrogate Shulz, *In re Keane*, 97 Misc. Rep. 213, 162 N. Y. Supp. 856, has reviewed the changes in the law of commissions as follows:

"Prior to the revision of chapter 18 of the Code of Civil Procedure by chapter 443 of the Laws of 1914, some confusion had arisen as to what section of the Code governed in the matter of commissions of testamentary trustees. By sections 2802 and 2810 of the Code as they then were, it was provided that testamentary trustees were entitled to the same commissions as were allowed by law to executors and administrators. The latter, under section 2730 of the Code, were entitled to commissions for 'receiving and paying out, all sums of money * * *' as therein more specifically set forth. Section 3320 of the Code of Civil Procedure, however, which prior to 1904 did not refer to the amount of trustees' commissions (Laws of 1902, c. 404) was amended in that year (Laws of 1904, c. 755) to provide for the commissions of trustees of an express trust, and the latter became entitled to commissions on all 'sums of principal' received and paid out by them, and on income received and paid out in each year. There was some doubt as to whether section 3320 applied to testamentary trustees, but in *Robertson v. De Brulatour*, 188 N. Y. 301, it was held that such trustees were under that section entitled to commissions for receiving and paying out all sums of principal, and for receiving and paying out income in each year, and that this gave the trustees a right to commissions, both for receiving them and for paying them over."

By the revision of 1914 section 2753 was enacted with a view of covering the whole ground. By Laws 1915, ch. 631, section 3320 was amended so that its provisions with regard to commissions no longer apply to testamentary trustees. See § 1548, Civ. Pr. A.

Waiving commissions.

It is legal for executors to waive their commissions for good reason, and such waiver is not an assignment which is prohibited. *In re Williams*, 170 N. Y. Supp. 80.

Commissions of Bronx county public administrator.

It has been held that this section does not affect or limit the fees of the Bronx county public administrator, whose fees are provided for in a special law, chap. 548, L. 1912, as amended by chap. 825, L. 1913. *In re Hammer*, 94 Misc. Rep. 36, 158 N. Y. Supp. 981.

Right to earn commissions.

A person appointed and qualified as an executor has the right to participate in the conduct of the business on the estate in order that he may not be deprived of some part of his commissions by apportionment. *Matter of Delaplaine*, 8 N. Y. St. Repr. 776.

Commissions on disposition of real estate to pay debts and other charges.

Commissions for disposing of real estate to pay debts and other charges are provided for in section 281, ¶ 255.

¶ 136 On What Property or Values Commissions are Computed.

Allowance of commissions cannot be based upon the inventory value of property or upon its estimated value, but must be computed upon the amount actually realized by a collection or sale, except where the legatee or distributee consents to accept the securities in lieu of cash.

Commissions should not be allowed upon the basis of the inventory of the estate, but only for actual services in receiving and disbursing the moneys of the estate. *Matter of Whipple*, 81 App. Div. 589, 81 N. Y. Supp. 393.

Our statute provides compensation for executors and administrators based upon sums of money received and paid

out. There is no mode of computing commissions other than is thus furnished by the statute. *Hall v. Tryon*, 1 Dem. 296; *Cairns v. Chaubert*, 9 Paige, 160.

Where the will gave the executor the right to continue any investments already made by testator whether the same were legal investments or not, and they were devisees and legatees of the whole estate, they are entitled to commissions on the value of the securities turned over to themselves as trustees. *Matter of Curtiss*, 15 Misc. Rep. 545, 73 N. Y. St. Repr. 124, 37 N. Y. Supp. 586. See *Matter of Freel*, 49 Misc. Rep. 386, 99 N. Y. Supp. 509.

An executor who renders services, but who may not have received or paid money, is still entitled to share in commissions. *Hill v. Nelson*, 1 Dem. 357.

It is the obvious intent of the law to make the sums called commissions compensation, not alone for the service of receiving and paying out, but compensation for the whole services measured by a fixed standard based upon receipts and disbursements. *Collier v. Munn*, 41 N. Y. 143; *Wagstaff v. Lowere*, 3 Abb. Pr. 411, 23 Barb. 209; *Hill v. Nelson*, 1 Dem. 357; *Matter of Harris*, 4 id. 463, 1 N. Y. St. Repr. 331.

Commissions may be allowed on securities delivered to and accepted by the legatee in the form in which they were received by the executor. *Matter of Ross*, 33 Misc. Rep. 163, 68 N. Y. Supp. 373; *McAlpine v. Potter*, 126 N. Y. 285.

Testator gave the contents of a safe-deposit box to be divided into twelve parts to eleven persons. The box contained stocks, bonds, etc.—*held*, that the executor was required to convert such securities in order to make division thereof and, therefore, was entitled to commissions on the value of the same. *Matter of Fisher*, 93 App. Div. 186, 87 N. Y. Supp. 567.

Commissions on rents.

Commissions cannot be allowed on rents collected after the death of the life tenant when the estate passed at once to the remainderman, nor upon the value of the real estate over

which the trustees had a power of sale. *In re Suarez's Est.*, 158 N. Y. Supp. 140.

Commissions on value of dower which has been admeasured.

Dower having been admeasured by decree of the Supreme Court, in an action therein, the payment thereof is not an executorial duty by virtue of the will, and no commissions thereon can be allowed. *Matter of Lawrence*, 37 Misc. Rep. 702, 76 N. Y. Supp. 653.

Where the will gave the wife her dower interest in all real property, no more, no less, the executors were not allowed to take commissions from such income. *Matter of Green*, 168 N. Y. Supp. 728.

Pledged property. See ¶ 195.

Where assets are pledged for a debt, and a sale is made under authority from the representative, the gross proceeds are to be treated as so much money coming to the hands of the representative and he may have commissions thereon. *Matter of Balles*, 67 Misc. Rep. 40, 124 N. Y. Supp. 620.

Commissions on assets received after judicial settlement.

A representative always being in office to take possession of new assets not at first discovered, may need to have a second judicial settlement to distribute such newly discovered assets.

On such accounting, the estate will not be considered as a new and independent one for the purpose of computing commissions, but the amount received must be treated as though it had been entered in the prior accounting and commissions computed upon the new assets at the rate as though the new amount had been added to the prior receipts.

Commissions on the value of land converted into personalty, or which represents an investment of personal property.

Commissions on land taken under foreclosure.

Real estate held by the executor or administrator as the result of foreclosure of a mortgage is still personal property

and commissions may be allowed upon its value. *Matter of Ross*, 33 Misc. Rep. 163, 68 N. Y. Supp. 373; *Matter of Tilden*, 44 Hun, 441, 9 N. Y. St. Repr. 258; *Bruce v. Lorillard*, 62 Hun, 416, 42 N. Y. St. Repr. 146, 16 N. Y. Supp. 900; *Phoenix v. Livingston*, 101 N. Y. 451.

Commissions to executors on the real estate devised to them or unsold by them.

As to whether or not executors are entitled to commissions based upon the value of real estate of the testator has been a question much discussed by many authorities and the correct answer has varied with the many changes in the statute upon that subject, therefore the cases must be carefully scrutinized to ascertain whether they were decided before such changes were made and particularly before the changes made in 1914, 1915 and 1916. What has been said with reference to the changes in former section 3320 of the Code in relation to commissions of trustees applies somewhat to commissions of executors as they are now substantially granted under the same provisions of law.

No commissions can be allowed on real estate directly devised, as such real estate is not received, delivered, distributed or converted into money. *Matter of Rhodes*, 109 Misc. Rep. 406, 178 N. Y. Supp. 782.

But where there is a devise to executors in trust for the purposes of the will it seems now to be well settled that the executors are entitled to one-half commissions on the value of the real estate at the time letters testamentary were issued for receiving the same but nothing for turning the same over unless the same has been converted into money.

In a few cases it has been held that where the beneficiaries accepted a deed from the executors to themselves the executors were entitled to commissions. *Matter of Buchanan*, 5 N. Y. St. Rep. 351; and that where the beneficiaries executed a confirmatory deed of land sold under a power contained in the will, the executors were not deprived of their commis-

sions. *Matter of Prentice*, 25 App. Div. 209, 49 N. Y. Supp. 353; aff'd, 160 N. Y. 568.

Where real estate is devised to executors in trust, and then over to remaindermen, the executors and trustees are entitled to one-half commission for receiving the real estate, but will be entitled to nothing when it passes in possession to the remaindermen. The value of the real estate should be determined as of the date of issue of letters. *Matter of Naylor*, 164 N. Y. Supp. 462; *Matter of Keane*, 97 Misc. Rep. 213, 162 N. Y. Supp. 856; *In re McGuirk*, 175 N. Y. Supp. 597.

Trustees not allowed commissions on real estate received before the amendment of 1914, where on an accounting they do not distribute or turn over the same, and the trust has not terminated. *In re Hamersley*, 99 Misc. Rep. 218, 163 N. Y. Supp. 667.

Commissions of trustees upon land received by them.

The amendment to section 2753, Code Civ. Pro., in effect May 19, 1916, changed the law relating to commissions to trustees on land "received" by them.

Unless lands devised to trustees in trust to pay the income thereof are "received" by them, there is no conceivable meaning to be derived from the words of section 2753 of the Code in the light of the history of the enactment and the condition of the law which provoked it. This view was clearly stated in *Matter of Keane*, 97 Misc. Rep. 213, in which the learned surrogate said:

"In the case under consideration, the real estate was devised to the trustees, and they have the power to sell it, thus differing from the situation in *Phoenix v. Livingston*, 101 N. Y. 451, and *Matter of Ross*, 33 Misc. Rep. 163 (68 N. Y. Supp. 373)."

So, also, in *Matter of Naylor's Estate*, 164 N. Y. Supp. 462, the learned surrogate said:

"There can be no question but that the trustees received the real estate," quoting the provision of the will containing

a devise in trust, and adding: "As the devise is direct to the trustees, there was unquestionably a receiving of the real estate within the meaning of section 2753, Code of Civil Procedure, so as to entitle the trustees to commissions on the same." *In re Potter*, 106 Misc. Rep. 113, 175 N. Y. Supp. 598; *Matter of Bearns*, 188 App. Div. 215, 176 N. Y. Supp. 794; *Matter of Freeman*, 105 Misc. Rep. 423, 174 N. Y. Supp. 416.

Commissions not allowed on the value of specific legacies. See ¶ 265.

Commissions cannot be computed on the value of a specific legacy or devise. § 285. *Schenk v. Dart*, 22 N. Y. 420; *Hall v. Tryon*, 1 Dem. 296; *Matter of Robinson*, 37 Misc. Rep. 336, 75 N. Y. Supp. 490.

Nor would this rule be changed even though the legatees by agreement among themselves directed the executor to sell the same and divide the proceeds. It might be that under such circumstances the executor could exact and enforce compensation for his services against the legatees, but his act in making sale of property specifically bequeathed and distributing the proceeds would not create any right to commissions or make the estate liable for his services. *Collier v. Munn*, 41 N. Y. 143.

Articles bequeathed which are to be separated from others by the executors, appraised and divided, do not constitute "specific bequests," and the executor is entitled to commissions on the value thereof. *In re Grosvenor*, 105 Misc. Rep. 344, 173 N. Y. Supp. 203.

Not allowed on specific securities directed to be turned over to trustees.

Where the will gave shares of stock in a designated corporation to trustees, and the executors transferred such stock to themselves as trustees, they were not allowed commissions as executors on the value of such stock, the surrogate holding that such legacy was specific and that a trustee was a legatee, following *Matter of Logan*, 131 N. Y. 456, 459; *Matter of Burden*, 98 Misc. Rep. 542, 164 N. Y. Supp. 747.

Commissions not allowed on receipts from carrying on business, or on amount of investments and reinvestments.

Trustees are entitled to commissions for receiving all moneys which constitute the *corpus* of the estate, and any additions thereto from increase of any kind, and thus the moneys upon which commissions are to be computed can never exceed the gross amount of the estate and its net income; and the moneys paid out on which commissions may be computed are the moneys paid out of the estate for debts, expenses of administration, and to legatees or other beneficiaries, moneys which operate to diminish the estate as it exists in the hands of the trustees and pass out of and away from the estate. This rule excludes commissions upon investments and reinvestments and moneys disbursed and received in the conduct of a business carried on to produce net income. *Beard v. Beard*, 140 N. Y. 260, 55 N. Y. St. Repr. 408; modg. 22 N. Y. Supp. 1; *Matter of Hayden*, 54 Hun, 197, 26 N. Y. St. Repr. 911; aff'd, 125 N. Y. 776.

¶ 137 Commissions to Representative of a Deceased Executor, Administrator, Testamentary Trustee or Guardian. See ¶¶ 144, 146.

Commissions to representative of deceased representative.

Commissions should be allowed to the representative of a deceased executor or administrator based upon the money actually received and paid out during his lifetime, but the amount to be allowed is in the discretion of the surrogate. *Matter of Bidgood*, 36 Misc. Rep. 516, 73 N. Y. Supp. 1061; *Matter of Whipple*, 81 App. Div. 589, 81 N. Y. Supp. 393.

The deceased being the trustee and having cared for and managed the estate, and the same being about to be distributed on the accounting of her executor, her estate was allowed full commissions. *Matter of Wilcox*, 125 App. Div. 152; revd. 194 N. Y. 288, 109 N. Y. Supp. 564, upon another point.

Commissions to representative of deceased trustee for his own services.

A representative who finds, among the effects of his decedent, an estate which was committed by law to his decedent as trustee, is but a finder or casual bailee whose duty is confined to the preservation and delivery of the assets to an officer thereafter appointed to take the same, and has no right or duty with respect to the administration of the trust.

In this view, it seems impossible to allow to the representative of a deceased trustee, who had no charge or control over the estate, any part of those commissions which can be awarded only for the service of administration.

It is impossible to conceive of commissions payable to a representative, for either receiving or paying out sums of money, when the legal nature of his relation to the estate forbids either act on his part. The mere act of preserving the assets, which are found among the effects of his decedent, cannot be regarded as the receiving which the statute requires; and, however that act may be regarded, it is beyond his lawful powers to pay out.

Although he is not entitled to commissions as such, it is provided in this relation as follows: "The Surrogate's Court has also jurisdiction to compel the executor or administrator, or successor of any decedent, at any time to deliver over any of the trust property which has come to his possession or is under his control, and if the same is delivered over after a decree, the court must allow such credit upon the decree as justice requires." § 266.

Under this language, it is the duty of the court to make the delivery of the trust assets dependent upon the discharge of any just claim of the executor, not as commissions, but as a measure of general justice. *Matter of Ingraham*, 60 Misc. Rep. 44, 112 N. Y. Supp. 763.

The estate of the deceased trustee can receive no commissions for paying over to the successor, because the trust property has vested by operation of law in the Supreme Court, and the same passes by operation of law to the new trustee upon

his due appointment. Such new trustee must necessarily receive the property in the same condition in which it was left by his predecessor. Unlike the original trustee, he cannot require its payment to him in cash, nor can he refuse to accept any particular security, since there is no one in office who can convert the property into money. *Matter of Silliman*, 67 Misc. Rep. 27.

Compensation should be allowed, and it may be based upon the commission rate.

The estate of a trustee who dies before judicial settlement is not entitled to commissions as such, but is entitled to compensation to be fixed and allowed by the surrogate. *In re Bushe*, 227 N. Y. 85.

While the estates of the deceased executors are not entitled to collect fees as a matter of right, still the surrogate in his discretion may make what he regards as a proper allowance, not exceeding the statutory rate, for their services for receiving the property, and in doing this he may take into account the value of the real estate which was in their charge. *Matter of Barker*, 230 N. Y. 364;

The estate is not entitled to be paid for turning over the principal to the substituted trustee nor in theory to his co-trustee if one survives. *Matter of Fisk*, 45 Misc. Rep. 298, 92 N. Y. Supp. 394; *Matter of Todd*, 64 App. Div. 435, 72 N. Y. Supp. 277; *Palmer v. Dunham*, 24 N. Y. St. Repr. 997, 53 Hun, 637, 6 N. Y. Supp. 262; *Atlantic Trust Co. v. Powell*, 50 N. Y. Supp. 866, 23 Misc. Rep. 289.

The distinction seems to be that if a trustee resigns he forfeits all right to commissions and can receive nothing for his services or must accept such sum as the court sees fit to give, while if a trustee dies he is entitled to one-half commissions for receiving and nothing for paying over. *Linsly v. Bogart*, 67 N. Y. St. Repr. 653, opinion of referee there given; *aff'd*, 152 N. Y. 646, without opinion; *Matter of Fisk*, 45 Misc. Rep. 298, 92 N. Y. Supp. 394; *Robertson v. De Brulatour*, 188 N. Y. 301; *Olcott v. Baldwin*, 190 N. Y. 99.

The theory of one-half commissions for receiving allowed to the estate of a deceased trustee is open to grave criticism, and is not recognized by the present section 285.

As was held in *Matter of McCormick*, 46 Misc. Rep. 386, 94 N. Y. Supp. 1071, 16 Ann. Cas. 401, the true theory is that commissions as such can only be allowed to a person in office when the allowance is made, and any other allowance should be as compensation, based in the discretion of the court, upon the same computation as would have been made if the recipient were alive, or determined in any other equitable manner.

¶ 138 Commissions and Compensation of Temporary Administrator.

The compensation of a temporary administrator is measured by the percentages specified in § 285, without regard to the value of the services rendered. The basis for computation is all of the property received and turned over without regard to whether it has been turned into money or not. The allowance is for receiving, caring for and turning over, not for administering. *Matter of Egan*, 7 Misc. Rep. 262, 27 N. Y. Supp. 1009, 59 N. Y. St. Repr. 372; *Green v. Sanders*, 18 Hun, 308; *Matter of King*, 122 App. Div. 354.

Because he is permitted to collect rents from real estate, he is not entitled to commission on the value of the real estate. *Matter of Runk*, 181 App. Div. 461, 168 N. Y. Supp. 970; aff'd, 224 N. Y. 570.

Election under successive letters.

If the same person is given permanent letters, he is entitled to only one full compensation, and must elect under which letters he will take fees, but he will be entitled to the excess if he has elected the wrong letters, so that in any event he will get the full compensation once. § 285.

Extra compensation. See ¶ 139.

The same principle will be applied to granting extra compensation to a temporary administrator for extra services as is applied to those holding permanent letters.

Compensation for legal services.

A temporary administrator has the same right to compensation for legal services performed by him, as has an executor or administrator. *In re Runk*, 181 App. Div. 461, 168 N. Y. Supp. 970, aff'd, 224 N. Y. 570.

But such amendment is not retroactive and the services must have been performed since September 1, 1914. *Matter of Daly*, 180 App. Div. 307.

¶ 139 Compensation in Addition to Commissions.**History of the subject.**

At common law executors and administrators were not allowed any compensation for their services (*Manning v. Manning*, 1 Johns. Ch. 527). This remained so in this State until 1817, when the Legislature empowered the court of chancery "to make a reasonable allowance to them for their services," on the settlement of their accounts, and prescribed that when "the rate of such allowance shall have been settled by the chancellor, it shall be conformed to in all cases of the settlement of such accounts." (Laws of 1816-1817, ch. 251; *McWhorter v. Benson*, 1 Hopk. Ch. 28). The chancellor thereupon adopted a general rule establishing a percentum on all moneys received and paid out as such compensation (3 Johns. Ch. 630). It was incorporated into the Revised Statutes of 1830 (Vol. 2, p. 93, § 58), and from there went into the Code of Civil Procedure.

It follows that the statute compensation is all that an executor or administrator may be paid for his services. There can be no exception to this rule. If he be allowed compensation out of the estate of the deceased other than that fixed by statute, it cannot be for services in his office, but only for something he has done apart from and entirely outside of his office, *i. e.*, as an individual and not as an executor or administrator. It is not enough that he does something for the estate which he has the right to employ another to do and pay him for out of the estate. That is not a test; on the contrary, it

must be something which does not come within the province of his office at all, either for him to do personally or employ another to do for the estate.

In *Vanderheyden v. Vanderheyden* (2 Paige, 287) the charge of a guardian for the care and superintendence of the infant's real property, in addition to the statute compensation — which is the same in the case of trustees and guardians as in the case of executors — was disallowed; in *Clinch v. Eckford* (8 Paige, 412), one of the executors was held entitled to extra compensation for any services he should render as clerk and bookkeeper of the estate, but only because the will expressly authorized it; in *Lansing v. Lansing* (45 Barb. 182, 1 Abb. N. S. 280) an executor worked out the highway tax of the testator instead of paying it or hiring another to work it out, and was allowed therefor in his accounting by the General Term of the Supreme Court; in *Lent v. Howard* (89 N. Y. 169) an executor was allowed compensation for managing and improving the real estate of the deceased, but only because as executor he had nothing to do with and no duty whatever in respect of the real estate, the will imposing none; in *Matter of Butler's Estate* (9 N. Y. Supp. 641) compensation as clerk was denied to an executor by the surrogate; in *Matter of Ingersoll* (6 Dem. 184, 20 N. Y. St. Repr. 356) the surrogate disallowed a charge by an executor for the use of his own horse and wagon in collecting the assets of the estate; in *Matter of Hayden* (54 Hun, 197, 7 N. Y. Supp. 313, 26 N. Y. St. Repr. 911; aff'd, 125 N. Y. 776) an executor was disallowed a salary for superintending and carrying on the business of the deceased. In *Matter of Taft's Estate* (8 N. Y. Supp. 282, 28 N. Y. St. Repr. 315) compensation was disallowed by the General Term of the Supreme Court to an executor, one of the surviving partners of the deceased, for carrying on the business, the will directing it to be carried on, but authorizing no extra compensation. In *Matter of McCord* (2 App. Div. 324, 37 N. Y. Supp. 852, 73 N. Y. St. Repr. 64) the will required the executors to collect the rents of the houses left by the tes-

tator and pay the same over to the widow and heirs until the executors should have sold the same under the power of sale given to them in the will. One of the executors had been employed by the testator to take charge of the said houses and clean, paint and repair them for a weekly salary. This agreement was continued by the widow and heirs, all of the parties in interest. The compensation was allowed. In *Matter of Young* (17 Misc. Rep. 680) the real estate was left to the executors in trust to manage and improve it, and collect the rents and pay them to the widow and otherwise dispose of them, and one of the executors devoted his time to managing the estate. The parties in interest agreed in advance that he should be allowed a specific monthly salary in addition to his statutory compensation "as compensation for his services as executor and trustee as aforesaid," and the surrogate allowed it. In *Matter of Moriarity* (27 Misc. Rep. 161, 58 N. Y. Supp. 380) the surrogate allowed compensation to a temporary administrator, who had been the manager of the business of the deceased, for carrying on such business under the direction of the surrogate, although the will did not provide therefor; in *Russell v. Hilton* (37 Misc. Rep. 642, 76 N. Y. Supp. 233; aff'd, 80 App. Div. 178; aff'd, 175 N. Y. 552), the Special Term allowed compensation to an executor for his services as architect in repairing the houses of the estate, the real estate being left in trust to the executors to collect and pay out the income.

From this review of the cases it is plain that the rule as stated above is settled. The decisions in *Matter of Moriarity* and *Russell v. Hilton* (*supra*) have to be disapproved. It is of great importance that the rule be not departed from. Once relaxed, the asking and giving of extra compensation would grow apace and become an intolerable abuse. Where it is permissible at all for an executor or trustee to make an agreement with his beneficiaries, it is subject to the general rule in respect of transactions between trustee and beneficiary, that while it is not void it is voidable, and may be called in ques-

tion for unfairness or any inequitableness. *Matter of Popp*, 123 App. Div. 2, 107 N. Y. Supp. 277.

In the *Popp* case *supra*, it was said that the decisions in the *Moriarity* and the *Hilton* cases should be disapproved.

Salary from corporation in which estate is stockholder.

The objection that the representative drew a salary as an officer of a corporation in which the estate was a stockholder, not sustained on judicial settlement. *Matter of Brown*, 78 Misc. Rep. 342, 139 N. Y. Supp. 459.

Executors who are directors of a corporation in which the estate is interested cannot be charged on an accounting before the surrogate with money paid to themselves as officers of the corporation. *Matter of Schaefer*, 65 App. Div. 378; modg. 34 Misc. Rep. 34, 69 N. Y. Supp. 489; aff'd, 171 N. Y. 686.

Agreement for extra compensation.

Where an agreement for extra compensation has been made between the representative, or trustee, and the persons interested, such agreement may be enforced on the accounting of all the interested persons are parties, under the more complete jurisdiction which is now given the court. The court did not have such jurisdiction when decision was made in such cases as: *Matter of Cornell*, 15 App. Div. 285, 44 N. Y. Supp. 585; modg. 41 id. 539.

Where one person was selected to manage a trust and it was agreed that he should receive a certain compensation, and accounts were rendered containing such charge, additional compensation to the other trustees by way of commissions will not be allowed. *Savage v. Sherman*, 24 Hun, 307; aff'd, 87 N. Y. 277.

Conducting business of testator.

Testator conducted a furniture business, employing his son at a salary. The son was one of the executors, who agreed with him to pay him the same salary to continue the business,

the will authorizing them to continue the business — *held*, that the salary could not be allowed; that his compensation was his commissions. *Matter of Hayden*, 54 Hun, 197; aff'd, 125 N. Y. 776, 26 N. Y. St. Repr. 911, 7 N. Y. Supp. 313.

Where the testator had a manufacturing business with raw stock on hand, which was made up by consent of all parties, the executor was allowed extra compensation. *Matter of Braunsdorf*, 13 Misc. Rep. 666, 69 N. Y. St. Repr. 652, 35 N. Y. Supp. 298; modified and aff'd, in 2 App. Div. 73, 37 N. Y. Supp. 229, 72 N. Y. St. Repr. 764.

The executor was an architect in the employ of testator, and the business was continued; extra compensation was allowed. *Russell v. Hilton*, 37 Misc. Rep. 642, 76 N. Y. Supp. 233; modified in 80 App. Div. 178, 80 N. Y. Supp. 563; aff'd, 175 N. Y. 525.

A partner authorized to continue the business by will cannot have additional compensation. *Matter of Dummett*, 38 Misc. Rep. 477, 77 N. Y. Supp. 1118.

Executors conducted the brick-making business and were not allowed extra compensation. *Matter of Archer*, 77 Misc. Rep. 288, 137 N. Y. Supp. 770.

¶ 140 Compensation Where the Executor, Administrator, Guardian or Trustee Acts Also as Attorney.

By the amended section 285, where an executor, administrator, guardian or testamentary trustee actually performs legal services of value, he may be allowed by the court compensation therefor. The amendment authorizes what is commonly done indirectly, and no doubt will work out to the advantage of the estates or funds, if surrogates adhere strictly to their duty of allowing only reasonable compensation for legal services actually performed. Under this section many lawyers who act as such officials will perform the necessary legal services for a less sum than they would expect another lawyer to charge for the same services.

The amendment of 1914 permitting an allowance of attor-

ney's fees to one who is also executor is not retroactive, and services so performed before Sept. 1, 1914, can not be compensated for. *In re Daly*, 180 A. D. 307, 167 N. Y. Supp. 229, aff'd, 223 N. Y. 671; revg. 165 N. Y. Supp. 792, 99 Misc. Rep. 203.

A lawyer named as executor in a will, but who does not qualify, may properly be employed as counsel by the acting executor, and proper payments to him will be allowed. *Campbell v. Mackie*, 1 Dem. 185.

The will directed that one of the executors act as attorney and be paid therefor — *held* that he should present his claim before the surrogate on the accounting and have it allowed there in the regular way. *Jacobsen v. Levine*, 59 Misc. Rep. 449, 110 N. Y. Supp. 1002.

¶ 141 When Commissions May be Denied.

Commissions may be denied for misconduct.

It is no longer open to doubt in this State that a surrogate may, in his discretion, upon the settlement of the accounts of an executor or administrator, deny him the statutory commissions if he has been guilty of misconduct, notwithstanding the requirement of section 285 of the Surrogates' Court Act, that upon the settlement of the account of an executor or administrator the surrogate must allow to him for his services the commissions fixed by law. *Matter of Rutledge*, 162 N. Y. 31, 30 Civ. Pro. R. 405, aff'g, 37 App. Div. 633, 56 N. Y. Supp. 1115. The exercise of this discretion is reviewable by the Appellate Division.

An administrator who causes loss by removing funds from a safe to an unsafe bank under his control will not be allowed commissions. *Matter of Scudder*, 21 Misc. Rep. 179, 47 N. Y. Supp. 101.

An executor will not be refused commissions because he did not answer letters of the legatees and did not seek a construction of the will. *Matter of Ingersoll*, 95 App. Div. 211, 88 N. Y. Supp. 698.

Commissions will not be allowed an executor who renounces pursuant to an agreement to receive the whole or any part of the commissions. See ¶ 143.

An executor can no more for a consideration dispose of his right to act as executor than a public officer could the right to exercise the functions of his office. It has many times been held that the assignment by a public officer of his fees or salary before earned is void as against public policy. *Bowery Nat. Bank v. Wilson*, 122 N. Y. 478, 34 N. Y. St. Repr. 43; *Taft v. Marsily*, 120 N. Y. 474, 31 N. Y. St. Repr. 584; *Lawrence v. Townsend*, 88 N. Y. 24; *Bliss v. Lawrence*, 58 id. 442. An executor is named in a will because the person making it has confidence in his integrity, and when the will has been admitted to probate and the letters testamentary issued, the position which, prior to the death of the testator was one of confidence, has become one of trust. The person is not obliged to act as executor. He can renounce his right, but he cannot sell it, and if he attempts to do so, any agreement for that purpose which has for its object the payment of a consideration cannot be enforced. Proper respect for the wishes of the dead as well as the due administration of justice prohibits one from enriching his own pocket in this way.

In *Matter of Worthington*, 141 N. Y. 9, 22 N. Y. Supp. 19, it was held that an agreement to dispose of commissions until they had been actually ascertained and fixed by the surrogate was void as against public policy, inasmuch as it diminished the incentive to diligence and zeal in the administration of the trust. If the commissions of an executor which have been partially earned cannot be assigned until they have been actually ascertained and fixed by the surrogate, much less then can an agreement not to perform any service at all, for a consideration, be enforced.

In *Staunton v. Parker* (19 Hun, 55), it was held that an agreement to renounce the office of executor for a consideration was void as against public policy. It is true the agreement there was made prior to the death of the testator, but

that is immaterial. The principle to be applied is the same, which is, that a person who is named as executor in a will cannot dispose of that position for a consideration. The words of the surrogate, used in refusing to give effect to the agreement in that case are quite pertinent. He said:

"If agreements of this nature are to be enforced, then surely testators may well doubt not only as to who will carry out their wills, but whether they will be carried out at all; * * * and if the will may be varied by agreement in the lifetime of the testator in a minor respect, it may be varied in an important one, and the door would be thrown wide open to fraud and corruption on the part of designing men and intriguing descendants and imposition upon confiding testators." *Oakshott v. Smith*, 104 App. Div. 384, 93 N. Y. Supp. 659, 16 Ann. Cas. 371; *aff'd*, 185 N. Y. 583.

Commissions may be denied in accordance with a provision of the will.

"Where the will provides a specific compensation to an executor, administrator, guardian or testamentary trustee, he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, within four months from the date of his letters, or in the case of a testamentary trustee or guardian, from the date of his filing his oath, he renounces the specific compensation." *From § 285, Sur. Ct. A.*

The will contained this provision: "I have made no provision to pay my son and B., the other executor, any commissions, because they will work for themselves and their children." One of the executors having died whereby the son had most of the work to do — *held*, that he was not entitled to commissions. *Matter of Gerard*, 1 Dem. 244.

The testator declared by his will that his executors should receive no compensation or fees for their services in settling the estate, and, therefore, the surrogate withheld them. *Secor v. Sentis*, 5 Redf. 570.

Language of the will construed as not declaring an intention to deny commissions to the wife of the testator. *Marshall v. Wysong*, 3 Dem. 173.

In an estate of over \$100,000 personal the testator may restrict the three executors named to one commission, to be divided among them. *Hill v. Nelson*, 1 Dem. 357.

Legacy to executors and trustees, in lieu of any and all commissions, etc.—*held*, that this provision applied to the

services of the trustees as well as the executors. *Brownson v. Roberts*, 5 Redf. 576.

The right to renounce the specific compensation given by will may be lost by laches. *Arthur v. Nelson*, 1 Dem. 337.

¶ 142 Compensation Fixed by the Will.

Accepting or rejecting compensation by will.

An amendment to section 285, provides that the executor, administrator, testamentary guardian or trustee must file his renunciation of the specific compensation in lieu of commissions within four months from the date he qualifies. This limit of time is to prevent such a delay that the persons interested in the estate or fund will not know what the approximate net value of the estate will be.

Where the date of the letters or of filing the oath is more than 4 months before the first of September, 1914, no penalty can be inflicted because of this section, and so as to compensation named in a will, it must be awarded under the old law.

Executors may lose the right to renounce the specific compensation provided for in a will in lieu of commissions by waiting to do so until long after they have been able to ascertain which would be most advantageous to them. *Arthur v. Nelson*, 1 Dem. 337.

Where compensation is named in the will it may be in addition to commissions and not in lieu of them.

At common law executors and administrators are entitled to no compensation for their work in the discharge of their duties, either at law or in equity; but in all the States compensation is now provided by statute. The statute controls in all cases when otherwise not provided for; but it cannot govern or restrict when a testator, for reasons of his own, has specially provided that compensation fixed by himself shall be given in addition to that provided by the statute. It would be restricting the testator's right of disposition of his own property to take any other view, since any surplus over statu-

tory fees may be regarded in the nature of a legacy; and the form of expression used by the testator that it shall be taken as an additional allowance or compensation, or expressed in any form of language, in no way affects the right to dispose of his property as he wills. *Matter of Schell*, 53 N. Y. 263.

Compensation can always be determined by a testator irrespective of the statute; and the authorities support the rule that if a testator has given a legacy in lieu of commissions, or directed that his executor should not have commissions, the court cannot defeat the provisions of the will (*Matter of Gerard*, 1 Dem. 244, 247; *Matter of Kernochan*, 104 N. Y. 618, 631, 6 N. Y. St. Repr. 439; *Secor v. Sentis*, 5 Redf. 570); but where there is no indication in the will that a bequest is intended to exclude further compensation, the executor is entitled to both the legacy and his statutory commissions (*Matter of Mason*, 98 N. Y. 527). Compensation may be provided for an executor by giving a specific sum equal, exceeding, or short of statutory commission in lieu of, or in addition to — it is all within the control of the testator.

Where the will provides that extra compensation shall be given to an executor, the court will allow it; and where the will provides that a reasonable compensation shall be given to an executor, beyond the commissions, and without fixing the amount, the court will allow a fair amount according to the services rendered. *Clinch v. Eckford*, 8 Paige, 412; *Meacham v. Sternes*, 9 id. 398.

Nor does the bequest to an executor deprive him of his right to compensation if the will fails to indicate that it was intended as a special compensation.

Only a legacy or specific sum given in lieu of commissions bars the allowance of statutory commissions, when, from the context of the will, it can fairly be concluded in whatever terms stated or, however, expressed that such legacy or specific sum is intended to take the place of the commissions allowed by law; but that when any legacy or specific sum is given in addition the executor is entitled to receive both, and

section 285 has no application. *Matter of Sprague*, 46 Misc. Rep. 216, 94 N. Y. Supp. 84.

A legacy in lieu of commissions which is stated to be in full for all "personal expenses, disbursements, and charges" does not prevent the executrix being reimbursed on accounting for services of counsel properly employed. *Matter of Rowe*, 42 Misc. Rep. 172, 86 N. Y. Supp. 253.

Charging upon income all "expenses and charges" does not create a legacy in lieu of commission. *Greer v. Greer*, 5 Redf. 214.

The will provided that I., one of the executors, should "receive a commission of 6 per cent. upon all moneys collected by him"—*held*, that this did not entitle such executor to commission on the entire proceeds of the estate, but only on such sums as he collected. *Ireland v. Corse*, 67 N. Y. 343.

Where compensation is given by will at more than the legal rate, pay for extra services was held to be covered by the provision for compensation in the will. *Matter of Froelich*, 122 App. Div. 440, 107 N. Y. Supp. 173; *aff'd*, 192 N. Y. 566.

Commissions fixed by will may not be in nature of a legacy so as to abate with other legacies.

The sum to be paid for the services of an executor is often fixed by will. When it is specified as for compensation it should not be treated as a legacy unless the will shows an intention to so give it, and the sum should not be abated with other legacies. *Matter of Tilden*, 44 Hun, 441, 9 N. Y. St. Repr. 258; *Richardson v. Richardson*, 145 App. Div. 540, 129 N. Y. Supp. 941.

¶ 143 Commissions Not Payable Until Awarded by Decree; Must be Awarded in Accordance With Law Then in Force.

Commissions are not due and payable until awarded and fixed on the accounting.

The allowance of commissions to an executor is a matter to be determined by the surrogate, and an executor has neither the power nor the right to pay or reserve the same to himself until they have been ascertained and allowed in the manner provided by statute. *Matter of Furniss*, 86 App. Div. 96, 83 N. Y. Supp. 530; *Matter of Dunkel*, 5 Dem. 188 10 N. Y. St. Repr. 213.

The allowance of commissions to an executor is a matter to be determined by the surrogate, and by the terms of section 285, such allowance is not to be made until the settlement of the account, for the executor may, by his own misconduct in his administration of the estate deprive himself of the right to the same.

Executors, having taken out commissions before settlement, were charged with interest thereon from the date of such misappropriation to date of decree allowing commissions. *Freeman v. Freeman*, 4 Redf. 211.

Retention of an amount for commissions before allowance by surrogate is unlawful. *Wyckoff v. Van Siclen*, 3 Dem. 75; *Carroll v. Hughes*, 5 Redf. 337; *U. S. Trust Co. v. Bixby*, 2 Dem. 294.

Where a settlement has been made between the parties and distribution made before judicial settlement and commissions taken at that time, interest will not be charged on such commissions to date of judicial settlement. *Matter of Franklin*, 26 Misc. Rep. 107, 56 N. Y. Supp. 858.

Must be awarded in accordance with commissions law in force at time of accounting.

The right to commissions, both as trustee, executor, and administrator is governed by the same law, and they must be

granted in accordance with the law in force at the time of the accounting. *Naylor v. Gale*, 73 Hun, 53, 56 N. Y. St. Repr. 103, 25 N. Y. Supp. 934; *Matter of Harris*, 4 Dem. 463, 1 N. Y. St. Repr. 331.

Commissions on intermediate or compulsory accounting.

Where there is an intermediate or compulsory accounting, not for the purpose of distribution, but for the purpose of fixing charges and credits, no commissions should be allowed upon the *corpus* of the estate remaining undistributed. Commissions may be allowed upon the income, and should be paid from the income. *Matter of Stevens*, 47 Misc. Rep. 560.

Commissions not assignable. See ¶ 141.

It is well settled that executors and administrators have no absolute right to commissions until they are determined upon and awarded by the surrogate on a judicial settlement of their accounts. They are unassignable and may be lost by misconduct or resignation or death. *Matter of Worthington*, 141 N. Y. 9; aff'g, 51 N. Y. St. Repr. 555, 56 id. 561; *Matter of Furniss*, 86 App. Div. 96, 83 N. Y. Supp. 530; *Matter of Dunkel*, 10 N. Y. St. Repr. 213, 5 Dem. 188; *Naylor v. Gale*, 73 Hun, 53, 56 N. Y. St. Repr. 103, 25 N. Y. Supp. 934.

¶ 144 Commissions and Compensation on Removal or Resignation; Commissions to Successors. See ¶ 137.

When an executor resigns or is removed before the completion of his duties he is not entitled, under section 285, to draw a full commission either for his own benefit or that of his associates. In such cases the amount of compensation to be allowed for his services is not measured by that section, but is in the discretion of the surrogate. The executors to whom commissions are to be awarded under that section are those who are such at the time of the judicial settlement, and not those who may have been at some prior time and who for any cause are no longer before the surrogate as such officers.

Matter of McCormick, 46 Misc. Rep. 386, 94 N. Y. Supp. 1071; *Matter of Douglas*, 60 App. Div. 64, 69 N. Y. Supp. 687; *Matter of Worthington*, 22 N. Y. Supp. 19.

Commissions on removal for cause.

In *Matter of Baker* (35 Hun, 272), the administrator with the will annexed was removed for failure to file a bond about eighteen months after his appointment, and it was held that as he had not completed his trust he was in the same position as one asking to resign and ought not to be allowed commissions on unconverted real estate.

Where letters are revoked for misconduct before the funds have been paid out, but one-half commissions are allowable. *Lyendecker v. Eisemann*, 3 Dem. 72,

In view of the trend of recent decisions these cases are rather more favorable to the removed officer than the present rule.

Commissions on resignation.

In *Matter of Hayden* (54 Hun, 197; aff'd, without opinion, 125 N. Y. 776, 7 N. Y. Supp. 313, 26 N. Y. St. Repr. 911), the executors were accounting on their application for leave to resign. The estate was over \$100,000 and there were three executors and one had done all the work. He asked for three full commissions on the uninvested value of the body of the estate not expended and upon that portion received and paid out. The court held that the executors having resigned before completing their duties they were not entitled to commissions on the body of the estate; as to the three full commissions on the amount received and paid out, the court said:

"Section 2736 of the Code (new § 285, Sur. Ct. A.) provides for commissions where the trust has been fully executed. It evidently has no application to a case where the trust is not executed, and the executors resign before their duties are finished. In such a case we think no executor has the right to claim either for himself or for his associate executors, the three commissions allowed by the section."

One full commission was allowed on the amount received and paid out.

In *Matter of Allen* (96 N. Y. 327), one trustee was seeking to resign and complained that the allowance of commissions was too small, while other parties claimed that none should have been allowed. The court said:

"The principal care may have devolved upon the other trustees, but this is not material. The testator thought proper not only to create the trust, but he required for its execution three trustees, and the law now permits compensation to persons placed in that situation, and who serve to the end of the trust without regard to the actual trouble or labor to which they have been put. It is true the petitioner cannot claim on that ground. He does not intend to continue. Compensation, therefore, cannot be claimed as of course, and if allowed must be measured by a different rule from that which the law applies when the trusts have been fully executed."

Trustees; commission and expenses on resignation.

If a testamentary trustee be allowed to resign he must accept such condition as to commissions as the court may make. *Matter of Allen*, 96 N. Y. 327; *Matter of Curtiss*, 15 Misc. Rep. 545, 73 N. Y. St. Repr. 124, 37 N. Y. Supp. 586; *Matter of Fisk*, 45 Misc. Rep. 298, 92 N. Y. Supp. 394.

The surrogate has jurisdiction to fix the commission or compensation of a trustee asking to resign. *Conant v. Wright*, 22 App. Div. 216, 48 N. Y. Supp. 422, aff'd, 162 N. Y. 635.

A trustee accounting for the purpose of resigning and having his letters revoked cannot be allowed from the trust fund costs and counsel fees. *Brautigam v. Escher*, 2 Dem. 269.

Commissions to succeeding representative after death, removal or resignation of prior representative.

An executor who does not qualify until after the death of his coexecutor is entitled to commissions upon what he receives and pays out, no matter what commissions have been allowed his coexecutor. *Matter of Depew*, 6 Dem. 54.

An executor, one of two or more named in a will, who does not act or qualify until after the death of one who did qualify, is entitled to full commissions on sums received and paid out and half commissions on sums received and not paid out. *Matter of Nelson*, 19 N. Y. St. Repr. 902.

Apportionment; one executor not acting.

Commissions are given for receiving and paying out the estate, so where one executor does not so act, he is not entitled to any part of the commissions. *Matter of Boyle*, 151 App. Div. 568, 136 N. Y. Supp. 96; aff'd, 208 N. Y. 545.

Where one only of three trustees is in office at time of accounting, only one full commission will be allowed where one trustee did not qualify, one died before completion of trust duties, and one only was in office at the time of accounting. *In re McCormick*, 46 Misc. Rep. 386, 94 N. Y. Supp. 1071.

Commissions of substituted trustees for receiving property.

It was held in *Matter of Goodwin*, N. Y. Law Journal, July 23, 1913, that a successor trustee could not be allowed commissions on principal received from his predecessor. A somewhat different rule was applied in *Matter of Silliman*, 67 Misc. Rep. 27, 124 N. Y. Supp. 622.

Since the decision in the *Matter of Baldwin*, 209 N. Y. 601, in which the Court of Appeals followed the Silliman case, courts have generally followed the rule of allowing one-half commissions to substituted trustees for receiving property. The decision in the Baldwin case does not disclose that branch of the case, but that was the question argued and decided.

¶ 145 Commissions Both as Executor and Trustee.

Double commissions to the same persons, first in the character of executors and then in that of trustees, are to be awarded only when the will contemplates a several and separable action in each capacity, not at the same but different stages of the administration, and that they are not to be allowed where the will makes no such separation but blends the two duties and commingles them without a severance. To the ordinary duties of an executor may be added the performance of a trust in such a manner that the two functions run on together. *McAlpine v. Potter*, 126 N. Y. 285, 37 N. Y. St. Repr. 6; *Hall v. Hall*, 78 N. Y. 535; *Matter of Starr*, 2 Dem. 141; *Matter of Zeigler*, 218 N. Y. 544.

Direction to executors to carry on the business of the testator for the benefit of his wife and daughter during their lives, and then distributed — *held*, no separation of the functions of executor and trustee and that only one commission was allowable. *Johnson v. Lawrence*, 95 N. Y. 154.

The leading case where it was held that the duties were separate and that double commissions were allowable is *Olcott v. Baldwin*, 190 N. Y. 99.

The use of the term “executors and trustees” does not necessarily define the character of the office. Whether they are to act in the capacity of executors or that of trustees is to be determined by the functions which they are to perform — *held* in this case, that the functions were separate. *Matter of Curtiss*, 15 Misc. Rep. 545, 73 N. Y. St. Repr. 124; *aff'd*, 9 App. Div. 285, 41 N. Y. Supp. 1111.

The will created a series of separate trust estates for the lives of specified beneficiaries, and gave in detail directions for such separation and further management — *held*, that the functions of executor and trustee were separate. *Phoenix v. Livingston*, 101 N. Y. 451.

No direction for the division of the estate into separate funds or trusts, nor any judicial settlement — *held*, double commissions not allowed. *Matter of Slocum*, 169 N. Y. 153.

In a case where the estate had not been converted and no separation of the duties by a decree had taken place, it was held that double commissions were not allowable. *Matter of Hogarty*, 62 App. Div. 79, 70 N. Y. Supp. 839, modifying 34 Misc. Rep. 610, 70 N. Y. Supp. 428.

Gift of whole estate to executors as trustees for the support of the husband during his life, and then for distribution — *held*, not to create a trust separate from the functions of the executorship and not to authorize the allowance of double commissions. *Matter of Bennett*, 42 N. Y. Supp. 674; reported below as *Matter of Clinton*, 16 Misc. Rep. 199, 74 N. Y. St. Repr. 534, 38 N. Y. Supp. 945.

A trust duty may be imposed upon executors, so that as to

commissions they can not have two commissions upon the whole fund, but may have trustees' commissions for receiving only. *In re Vanneck*, 175 App. Div. 363, 161 N. Y. Supp. 893.

Effect of judicial settlement.

To entitle persons named in a will as executors and as trustees to double commissions they must have actually entered upon their duties as trustees. An accounting as executors and a transfer of the trust fund to the trustees pursuant to a decree of a court of competent jurisdiction is the most satisfactory proof of the completion of their duties in one capacity and the commencement of their duties in the other capacity, but such judicial decree is not the only means of proving that the transfer has actually been made. *Olcott v. Baldwin*, 190 N. Y. 99; modg. 112 App. Div. 921.

Where a decree on intermediate accounting directs the executors to hold a fund as trustees and a fair construction of the will does not constitute them trustees, the decree will not have that effect and does not furnish ground for awarding double commissions. *McKie v. Clark*, 3 Dem. 380.

Where the executors had an accounting and the trust fund was established and they were allowed full commissions upon an accounting as trustees upon the death of one of the beneficiaries, it was held that it was a case of double commissions, even though there had been no actual division of the trust funds as directed by the will. *Laytin v. Davidson*, 95 N. Y. 263.

Where a trust fund has been separated pursuant to a decree on executor's final accounting and invested by itself, the trustee is allowed full commissions on distributing it, although he was allowed full commissions on his accounting as executor. *Hall v. Campbell*, 1 Dem. 415. See *Hall v. Hall*, 18 Hun, 358, 78 N. Y. 535.

An executor will continue to act as executor and not as trustee after an accounting where the will does not separate the two offices, and the former decree does not provide for such separation. *Matter of Hood*, 98 N. Y. 363.

¶ 146 More Than One Full Commission; Estates of More Than \$100,000 Personal.

If the gross value of the principal of the estate or fund accounted for amounts to one hundred thousand dollars or more, each executor, administrator, guardian or testamentary trustee is entitled to the full compensation on principal and income allowed herein to a sole executor, administrator, guardian or testamentary trustee, unless there are more than three, in which case the compensation to which three would be entitled must be apportioned among them according to the services rendered by them, respectively. *From § 285, Sur. Ct. A.*

Value of the estate or fund.

Formerly the estate or fund had to be of the value of one hundred thousand dollars exclusive of debts, but now it is the gross value which fixes the right to more than one commission, hence the earlier cases on that point are not applicable.

The income can not be figured in to make up the one hundred thousand, but of course it is included when the commissions are computed. *Slosson v. Naylor*, 2 Dem. 257; *Matter of Johnson*, 170 N. Y. 139.

Including value of unsold real estate.

The value of unsold real estate which is by the will converted into personal estate may be considered in determining whether or not the estate consists of more than \$100,000 personal. *Matter of Clinton*, 16 Misc. Rep. 199, 74 N. Y. St. Repr. 534; *aff'd*, 12 App. Div. 132, 42 N. Y. Supp. 674.

The rule that for the purpose of ascertaining if the estate amounts to more than \$100,000 the value of unsold real estate may be taken into consideration does not apply when there is a discretionary power of sale which does not work an equitable conversion. *Matter of McGlynn*, 41 Misc. Rep. 156, 83 N. Y. Supp. 975; *Matter of Desmond*, 156 N. Y. Supp. 268; *Matter of Grossman*, 92 Misc. Rep. 686, 156 N. Y. Supp. 268.

Since the amendment to former section 2753 which interpolated the words "and the increment thereof, received" trustees in respect to real estate unsold are in the same position as to commissions as they were in respect to securities. They are entitled to one-half legal commissions on real estate

received, and the value thereof may be considered in ascertaining whether the principal of the fund is in excess of \$100,000. *Matter of Keane*, 97 Misc. Rep. 213, 162 N. Y. Supp. 856.

Trustees who are to receive, take charge of, and finally sell real estate and distribute the proceeds, are entitled to have the value of the real estate added to the value of the personal estate to determine whether they are entitled to more than one full commission. *In re Naylor's Est.*, 164 N. Y. Supp. 462.

Rents from real estate added to personal.

Where personal estate did not amount to \$100,000 but the executors by consent of all parties were at the same time accounting for rents of a large amount, the executors were allowed commissions, as if the personal estate were \$100,000. *Matter of Leggatt*, 4 Redf. 148.

Apportionment of commissions.

In *Matter of Buchanan* (Alb. Co. Sur.), (5 N. Y. St. Repr. 351), there were three executors who performed unequal services, and three full commissions were divided in the proportion of three-twelfths, four-twelfths, and five-twelfths, thus giving the most active executor more than the amount of one commission.

In *Matter of Kenworthy* (General Term, Second Department), (63 Hun, 165, 44 N. Y. St. Repr. 275, 17 N. Y. Supp. 655), there were three executors and only two commissions were allowed by the surrogate. The executrix having received and disbursed only a small amount of money was held not to be entitled to any commission. The General Term reversed saying that the power to apportion does not include the power to totally abate any executor's compensation.

In *Matter of Meyer* (95 App. Div. 443, 88 N. Y. Supp. 798; aff'd, 181 N. Y. 562), the fourth executor did little work, went to Europe, and was there at the time of the final judicial settlement. Two full commissions were allowed the two active

executors, one-half of the third commission was allowed the third executor, and the remaining one-half was allowed the absent executor.

Estate of more than \$100,000; one executor dying. See ¶ 137.

Estate of over \$100,000 personal with two executors. One, after serving sixteen months, died; the other completed the trust duties — *held*, that two full commissions should be allowed, one to the surviving executor, etc., and in addition one-half of the commission allowed by law upon all property on hand and undistributed at the death of the coexecutor; and to the executor of the deceased executor commissions on all property actually received, paid out, and distributed to legatees and others by both up to the death of one, and in addition one-half the commission on all property held by both executors and remaining on hand at the date of death of said coexecutor, thus allowing two full commissions. *Matter of Newland*, 7 Misc. Rep. 728, 59 N. Y. St. Repr. 526, 28 N. Y. Supp. 496.

Estate of over \$100,000 with three executors; one died six months after appointment — *held*, that three full commissions should be apportioned among the two survivors and the executor of the deceased executor. *Welling v. Welling*, 3 Dem. 511, 7 Civ. Pro. R. 92.

Each trust less than \$100,000.

Where an original estate of more than \$100,000 is divided into several trust funds, being less than \$100,000, each trust constitutes an estate by itself. The basis upon which the commissions of the trustees should be computed is the value of the property and income of each trust, separately considered, without reference to the property of other trusts, or that of the original estate from which they sprung. The statute does not mean that the value of the original estate should follow each of the trusts springing therefrom, but that each of the latter should stand by itself and the commissions of the trustees thereof be allowed according to the value of the assets

belonging exclusively thereto. *Matter of Johnson*, 170 N. Y. 139; modg. 57 App. Div. 494, 67 N. Y. Supp. 1004; *Matter of Potter*, 106 Misc. Rep. 113, 175 N. Y. Supp. 598.

¶ 147 Commissions Allowed Upon Income; How Computed.
Commission on income when trust estate exceeds \$100,000.

Prior to the amendment of section 3320, Code Civ. Pro., in 1904, it was held that unless a trust estate's annual income amounts to \$100,000 the trustees are together entitled to only one commission on income. *Matter of Holbrook*, 39 Misc. Rep. 139, 78 N. Y. Supp. 972; *Matter of Willetts*, 112 N. Y. 289; modifying 9 N. Y. St. Repr. 321.

Section 3320, Code Civ. Pro., was later amended to read as follows:

"If the value of the principal of the trust estate or fund equals or exceeds \$100,000, each such trustee is entitled to the full commission on principal, and on income for each year, to which a sole trustee is entitled. * * *."

This amendment was discussed in *Matter of Hunt*, 41 Misc. Rep. 72, 83 N. Y. Supp. 652, where commissions on yearly income of less than \$100,000 were allowed. The revision of 1914 adopted this language found in section 3320 and incorporated it into section 2753, and made that section in terms apply to trustees, so that trustees accounting in Surrogate's Court have had commissions allowed in accordance with section 2753 and not in accordance with section 3320.

Commissions on income should be paid from income, not principal.

Residue to executors in trust to apply income to support of widow; upon death and distribution commissions are to be taken from income and not from *corpus*. *Matter of Cammann*, 2 Dem. 211; *Stubbs v. Stubbs*, 4 Redf. 170; *Mount v. Mount*, 2 Redf. 406, disapproved.

A fund is chargeable with commissions and taxes, which is set apart and the income thereof given without any particular amount being specified, but where the amount is specified as in the case of an annuity, the fund must bear the commissions and expenses. *Lansing v. Lansing*, 1 Abb. Pr. (N. S.) 280, 45

Barb. 182; *Pinckney v. Pinckney*, 1 Bradf. 269; *Whitson v. Whitson*, 53 N. Y. 479.

Commissions on income may be retained annually.

If an executor acting as trustee, or if a trustee or guardian, is required to receive income and pay over the same, and such executor, trustee or guardian pays over said income and renders an annual account to the beneficiary of all his receipts and disbursements on account thereof, he shall be allowed, and may retain, the same commission on the amount so accounted for as he would be allowed upon principal on a judicial settlement; if he does not render such annual account, he shall be allowed, upon his judicial settlement, his commissions upon the total income from any money or property then payable to such beneficiary.

From § 285, Sur. Ct. A. Former § 2753, Code Civ. Pro.

The amendment made to former section 2753 in 1914 inserted the substance of the decisions as to retaining commissions on income, and added the further right to be allowed commissions on total income, where annual accounts have not been made, upon judicial settlement when there is a surplus of income to be paid to the same beneficiary.

The cases which follow are given as showing the reasons for making these changes, and the gradual tendency of the decisions towards the rule now adopted.

When applying the rule to future cases, the section must be followed and not the cases given.

Where a trustee is required to keep trust funds invested and to receive and pay out the income annually, and he receives the income and renders an account thereof to the beneficiary, and pays over the balance of the income, after deducting all expenses chargeable to the same, he has the right to deduct for his compensation full commissions on the income annually received before paying it over. *Matter of Mason*, 98 N. Y. 527; *Hancox v. Meeker*, 95 id. 528; *Matter of Selleck*, 111 id. 284.

These cases may be considered as overruling such cases as *Brush v. Smith* (1 Dem. 477).

Deduction of commissions may be made semi-annually.

Where income is directed to be paid over semi-annually, and such settlement is made semi-annually, commissions may

be deducted, but not in excess of the legal rate for the year. *Matter of Roberts*, 40 Misc. Rep. 512, 82 N. Y. Supp. 805; *Matter of Mitchell*, 41 Misc. Rep. 603, 85 N. Y. Supp. 288.

Commissions on income not deducted annually may in certain cases be considered waived.

There seems to be no well defined rule laid down and adhered to by the courts by which it can be determined whether a trustee has or has not waived the excess of commissions. Each case ought not to be left for decision upon its own facts for then no trustee can be certain as to his legal rights. The cases which practically established the rule that the trustee might take full commissions annually are *Hancock v. Meeker*, (95 N. Y. 528), and *Matter of Mason* (98 id. 527). The reasons given in those cases for allowing full commissions annually were weakened in the case, *Matter of Selleck*, 111 N. Y. 284; but that decision ought not to be considered as authority upon any other state of facts than those set forth in that case, and the rule ought to be adhered to that full annual commissions cannot be taken unless there has been an annual accounting and settlement between the parties. Such rule was distinctly applied in *Conger v. Conger*, 105 App. Div. 589; aff'd, 185 N. Y. 554. If such settlement has in fact been made and no commissions taken or insufficient commissions taken, then the trustee should be held to have waived such commissions, unless, when he seeks to take them either at another annual accounting or upon an official accounting, he has income in his hands belonging and payable to the same person to whom former payment was made, which sum is sufficient to reimburse him for the amount of commissions due him and not retained. The cases do not seem to be consistent upon this point, and some hold that he can only reimburse himself if there is a surplus of income for the particular years in which he failed to retain them. In those cases where the trustee has not had annual settlements of his account, he ought to be allowed the usual commissions upon the aggregate amounts received by him, provided he has in his hands a sur-

plus of income belonging to the same party to whom he has made the payments; and he ought not to be held to have waived such commissions to the extent of such surplus of income, no matter in what fiscal year such income may have been received. *Matter of Norton*, 58 Misc. Rep. 133, 110 N. Y. Supp. 474. See also *Olcott v. Baldwin*, 190 N. Y. 99; modg. 112 App. Div. 921; *Matter of Harper*, 27 Misc. Rep. 471, 59 N. Y. Supp. 373; *Spencer v. Spencer*, 38 App. Div. 403, 90 N. Y. St. Repr. 460; *Matter of Austin*, 60 App. Div. 445, 103 N. Y. St. Repr. 1036; mod'd in 169 N. Y. 153; *Matter of Has-kins*, 111 App. Div. 754; revg. 49 Misc. Rep. 177; *Matter of Haight*, 51 App. Div. 310, 98 N. Y. St. Repr. 1029, 64 N. Y. Supp. 1029.

Where, through a long series of years, trustees voluntarily pay the income from a trust fund to the beneficiary as the full net income thereon, it is a waiver by such trustees of their commissions. *Olcott v. Baldwin*, 190 N. Y. 99; modg. 112 App. Div. 921; *Cook v. Stockwell*, 206 N. Y. 481.

Where the whole income has been paid over, deduction for past commissions cannot be allowed. *Matter of Harper*, 27 Misc. Rep. 471, 59 N. Y. Supp. 373.

Where a trustee pays over all the income without deducting commissions annually, he waives his right to annual commissions, and on a settlement will be allowed only on the total amount. *Conger v. Conger*, 105 App. Div. 589; aff'd, 185 N. Y. 554; *Spencer v. Spencer*, 38 App. Div. 403.

Applied to guardians.

Upon the question of commissions claimed by the guardian the rule seems to have been settled by the Court of Appeals in the case of *Morgan v. Hannas*, reported in 13 Abb. Pr. (N. S.) 361, 49 N. Y. 667. Judge Folger, in writing the opinion, states the rule as follows: " * * * where annual rests are required by the special direction of a court, for the sake of charging the trustee with interest, or by a rule of court, or by the provisions of statute; then full commissions may be computed upon the amounts, excluding reinvestments of principal."

A guardian will be allowed annual commissions on income only in cases where he has rendered an annual account and annual income has been paid over to or for the use of the beneficiary. *In re Chenery's Est.*, 152 N. Y. Supp. 312, 89 Misc. Rep. 680.

In *Matter of Greene*, 21 Misc. Rep. 403, 130 N. Y. Supp. 205, the committee of an incompetent had filed his regular annual account to which objections were filed. The county judge held that the committee might deduct his commissions on the sums both received and paid out.

A temporary guardian who is accounting to a general guardian appointed at the request of the infant is entitled to commissions for both receiving and paying out the principal. *Phillips v. Lockwood*, 4 Dem. 299.

Where the guardian has fairly and in the interest of the infant expended the infant's whole income, his successor may be directed to reserve sufficient future income to pay such commissions. *Oakley v. Oakley*, 3 Dem. 140.

Where a guardian invests or reinvests funds, he is not entitled to commissions upon such reinvestments but only upon the interest or income arising from the same. *Matter of Kellogg*, 7 Paige, 265; *Matter of Decker*, 37 Misc. Rep. 527, 76 N. Y. Supp. 315.

Since by the revised section 255 a guardian may now have an intermediate judicial settlement, he is entitled to have his commissions allowed upon such settlement.

Trust vested in supreme court. See ¶¶ 135, 140, 146.

Upon the death of a sole surviving trustee or last surviving trustee the trust estate vests in the Supreme Court (Pers. Prop. Law, § 20; Real Prop. Law, § 111).

It is provided by section 20 of the Personal Property Law and section 111 of the Real Property Law, that a person so appointed by the Supreme Court "shall be entitled to such compensation for his services by way of commissions as may be fixed by any court which has power to pass upon his final account, which shall in no case exceed that now allowed by law to executors and administrators."

This provision was not repealed when the addition to section 3320 of the Code of Civil Procedure was made, making a general rule for the allowance of commissions to all trustees.

Commissions; trustee appointed by supreme court.

To bring successor trustees appointed by the Supreme Court within the provisions of § 20, Pers. Prop. L., so as to enable the surrogate to award them commissions upon the principal of the trust fund other than for paying out, it is necessary that they should have succeeded a deceased, "last surviving or sole surviving trustee." *Estate of Geo. Law*, N. Y. Law J., June 18, 1913; *Whitehead v. Draper*, 132 App. Div. 799, 117 N. Y. Supp. 539.

¶ 148 Commissions on Securities Received But Not Sold.

"The Legislature passed the act of 1904, which in express terms awarded to trustees of express trusts commissions, and instead of using the language which had before been used in relation to executors' commissions and which the Court of Appeals have construed so as to award commissions only when the property had been received and turned into money, or accepted by the residuary legatee as money, it provided that a trustee of an express trust is entitled, as compensation for services as such, over and above expenses, to commissions as follows: 'For receiving and paying out all sums of principal,' etc. 'All sums of principal' would apply as well to securities in bulk as it would to money received. Where the principal of the trust consists of securities in which the trust is invested, whether they are turned over to the trustees in specie or money, in either case the trustees have received the principal of the estate, and as the section gives to a trustee of an express trust commissions based upon the sums of principal, it would seem that he is entitled to one-half commissions for receiving the securities in which the estate is to remain invested immediately upon their receipt.

"Considering the services that the trustees render for which they are entitled to this commission, the provision is a

reasonable one. When the securities are turned over to the trustees, they must see that they are properly transferred so as to protect the estate and that arrangements are definitely made for the continuance of the trust. The trust then continues without further action by the trustees so far as these securities are concerned, the trustees merely receiving in the meantime the interest and turning it over to those entitled to it until the termination of the trust, when the securities have to be transferred to those entitled to them. The mere fact that a reinvestment may be necessary during the continuance of the trust, the securities being paid off, or of its being necessary to sell them and reinvest the proceeds, would not, of course, entitle the trustees to any additional compensation, that being incident to the proper performance of the duties of the trust. In view of what has been said in the cases before cited, under section 3320 of the Code, as amended by chapter 755 of the Laws of 1904, where specific personal property has been given to a trustee in trust, to receive the rents and profits for the benefit of a life beneficiary, and such securities are received and held by the trustees, the trustees are entitled to one-half commissions for receiving it immediately upon the receipt of the property, out of the *corpus* of the estate." *Robertson v. De Brulatour*, 111 App Div. 882; *aff'd*, 188 N. Y. 301.

The doctrine of one-half commissions. See ¶¶ 137, 146.

The doctrine of half commissions for receiving and half for paying out approved. *Rowland v. Morgan*, 3 Dem. 289.

Where executors are directed to invest the estate and pay over income, on an accounting before the completion of their duties, but several years after the investment of the funds, they are entitled to one-half commissions on the principal. *Matter of Johnson*, 57 App. Div. 494, 67 N. Y. Supp. 1004; *aff'd*, 170 N. Y. 139; *Matter of Keane*, 97 Misc. Rep. 213.

CHAPTER XXXII.

Costs in Actions by and Against Executors and Administrators; Costs and Allowances in Surrogates' Courts.

- ¶ 149. § 1499. Costs where judgment for sum of money rendered.
- ¶ 150. § 1500. How charged and collected.
- ¶ 151. § 275. In surrogate's court.
- ¶ 152. § 276. In decree or order, how payable, and collectible.
- § 277. Granting or refusing an order.
- ¶ 153. § 278. Amount to be fixed.
- ¶ 154. § 280. To special guardian.
- ¶ 155. Decree should fix and award; jury trial.
- ¶ 156. § 279. Additional allowance on judicial settlement.
- § 281. On sale of real property to pay debts, etc.
- ¶ 157. § 282. Security for costs.
- ¶ 158. § 283. Costs on appeal, and on making decree after appeal.

¶ 149 Costs When Judgment Rendered Against an Executor, Administrator, Guardian or Trustee.

Costs as a matter of right and as a matter of discretion.

There are two forms of actions in which costs are to be taken under the Civil Practice Act.

In one they belong, of course, to the prevailing party; in the other they may or may not be allowed in the discretion of the court.

Section 1470 Civ. Pr. A., prescribes the cases in which the plaintiff is entitled to costs, of course. Section 1475, Civ. Pr. A., provides that the defendant shall have costs, of course, in case the plaintiff be not entitled thereto. And section 1477, Civ. Pr. A., provides that except as prescribed in preceding sections the court may upon the rendering of the final judgment in its discretion award costs to any party. *Larkin v. McNamee*, 109 App. Div. 884, 96 N. Y. Supp. 827; aff'd, 188 N. Y. 588.

Costs and disbursements in action against executor or administrator.

Where a judgment for a sum of money only is rendered against an executor or administrator in an action brought against him in his representative capacity, costs shall not be awarded against him, except that where it appears that the

plaintiff's demand was presented within the time limited by a notice, published as prescribed by law, requiring creditors to present their claims, and that the payment thereof was unreasonably resisted or neglected, the court may award costs and disbursements or disbursements without costs against the executor or administrator, to be collected either out of his individual property or out of the property of the decedent as the court directs, having reference to the facts which appear upon the trial. Where the action is brought in the supreme court or any county court, the facts must be certified by the judge or referee before whom the trial took place. § 1499, *Civ. Pr. A.*

Former §§ 1835 and 1836, consolidated without change of substance.

Granting the certificate.

This section does not apply in cases where the action was originally begun against a debtor who thereafter died and was continued against his representative. *Merritt v. Thompson*, 27 N. Y. 225; *McCann v. Bradley*, 15 How. 79.

Where there is doubt about there being a contract for services and about the length of time of their continuance, the representative should not be charged with costs. *McKee v. Lavery*, 41 App. Div. 629, 58 N. Y. Supp. 990.

Costs are not to be awarded to the defendant because they cannot be awarded to the plaintiff. *Hopkins v. Lott*, 111 N. Y. 577.

Trial and appeal by executor and new trial, application for costs against executors — *held*, that the executors were entitled to one lawful trial without costs, and that the first having been reversed the last was the one binding and effective trial. *Benjamin v. Ver Nooy*, 168 N. Y. 578; *aff'g*, 36 App. Div. 581, 55 N. Y. Supp. 796.

Costs may be allowed against an executor or administrator even though the amount of the claim when presented was larger than that stated in the complaint and than was recovered. *Carter v. Beckwith*, 104 N. Y. 236.

An amendment to the complaint so that a party may prove and recover a greater amount does not change the claim so as to affect the award of costs. *Field v. Field*, 77 N. Y. 294.

Where claim was reduced from \$615 to \$321, costs cannot be allowed because the claim was unreasonably resisted. *Anderson v. McCann*, 14 App. Div. 365, 43 N. Y. Supp. 956.

Nor where a \$5,000 claim was reduced to \$3,000. *Holcombe v. Nettleton*, 41 Misc. Rep. 504, 85 N. Y. Supp. 12.

A reduction of a claim of \$196 by \$17 is not evidence that the claim was not unreasonably resisted, since the whole claim should not have been rejected. *Dukelow v. Searles*, 65 Hun, 625, 20 N. Y. Supp. 348.

Certificate by Appellate Division.

This section does not apply to or preclude an award of costs against executors on an appeal. *Hunt v. Connor*, 17 Abb. Prac. 466; *Matson v. Abbey*, 141 N. Y. 179. Where costs are awarded against the executors in their representative capacities, and not personally, it has been held that the executors are not aggrieved and may not appeal. *Meltzer v. Doll*, 91 N. Y. 365. That decision and *Demarest v. Smith*, 143 App. Div. 104, 127 N. Y. Supp. 659, were not intended to deprive the plaintiff of the right to costs, either against the personal representatives personally or in their representative capacities, when it became necessary for the plaintiff to bring the action, but in either case the certificate is required.

In the instances in which the Appellate Division is authorized to reverse a judgment, and make new findings and direct the entry of a judgment in favor of the other party, it takes the place of the trial court, and on such reversal it is for the Appellate Court to decide whether or not the executors unreasonably resisted or neglected to pay plaintiff's claim, and whether or not they should be compelled to pay the costs of the trial individually. *Hewlett v. Van Voorhis*, — App. Div. —, 189 N. Y. Supp. 27.

Refusal to "refer" or "consent."

By sections of the Code of Civil Procedure 1822, 1835 and 1836, the former practice provided that costs could not be awarded in an action to recover on a debt or claim owing by the deceased against an executor or administrator, unless the representative neglected to file a consent to refer the claim, or unreasonably resisted or neglected payment of the same.

In 1914 and 1915 amendments were made which radically changed the procedure relating to determination of claims under which a consent to refer was not a part of the system, and the penalty as to costs was therefore removed.

This left the general statute applicable except as modified by section 1499 of the Civil Practice Act.

Must have certificate.

Costs cannot be awarded without the issuance of the required certificate. *Matson v. Abbey*, 141 N. Y. 179; modg. 70 Hun, 475, 53 N. Y. St. Repr. 794, 24 N. Y. Supp. 284; *Darde v. Conklin*, 73 App. Div. 590, 77 N. Y. Supp. 39.

Review by appeal.

Where costs are allowed by a referee the only mode of reviewing his determination is by appeal, and a motion for that purpose is not proper. *Domeyer v. Hoes*, 99 App. Div. 294, 90 N. Y. Supp. 1074.

Costs either against the representative or against the estate.

“ The use of the language ‘ the court may award costs,’ etc., was not intended to give the court a discretionary power to give or withhold costs where the necessary facts exist, but has relation to the discretion to award the costs to be paid either by the executor personally or out of the estate, ‘ having reference to the facts which appear upon the trial.’ That is, if the executor had improperly involved the estate in litigation by unreasonably resisting or neglecting to pay a just claim, or if his conduct was contumacious or in bad faith, the court could properly compel him to personally pay the costs of the litigation thus unnecessarily carried on, while if his conduct was marked by considerations of justice and fair dealing the court might place the burden upon the estate, and the requirement that the trial judge should certify the facts is in harmony with this provision.” *Demarest v. Smith*, 143 App. Div. 104, 127 N. Y. Supp. 659.

¶ 150 Costs in Action by or Against Representative, How Charged and Collected. See ¶ 130.

In an action, brought by or against an executor or administrator, in his representative capacity, or the trustee or an express trust, or a person expressly authorized by statute to sue or to be sued, costs must be awarded, as in an action by or against a person, prosecuting or defending in his own right, except as otherwise prescribed in the last preceding section; but they are exclusively chargeable upon, and collectible from the estate, fund, or person represented, unless the court directs them to be paid, by the party personally, for mismanagement or bad faith in the prosecution or defence of the action.

§ 1500, *Civ. Pr. A.* Former § 3246, *Code Civ. Pro.*

Where it is a question of awarding costs against an unsuccessful plaintiff-administrator personally, mismanagement or bad faith is not an element, for this section in that respect applies only where the cause of action arose in favor of the deceased and not in favor of his representatives personally. *Mullen v. Glinn*, 88 Hun, 128, 34 N. Y. Supp. 625, 68 N. Y. St. Repr. 680.

Although a claim sued upon by the representative did not exist at the time of the death of the deceased, if its recovery would become part of the estate, a judgment for costs against the representative must be paid from the estate funds even though the estate be insolvent. *Matter of Mahoney*, 37 Misc. Rep. 472, 75 N. Y. Supp. 1056; *Matter of Friedlander*, 145 id. 679.

In an equity action, a direction giving costs in favor of the defendant is equivalent to the statutory right securing costs to the successful party in legal actions. *House v. Lockwood*, 48 Hun, 550, 16 N. Y. St. Repr. 13, 1 N. Y. Supp. 540.

Costs awarded against the plaintiff who is suing as executor are payable out of the estate. *Dodge v. Crandall*, 30 N. Y. 294.

When costs are discretionary.

Except as prescribed in the preceding sections of this article, the court, upon the rendering of a final judgment, in its discretion may award costs to any party in such sum not exceeding the total amount authorized by statute as to the court shall seem just. § 1477, *Civ. Pr. A.* Former § 3230, *Code Civ. Pro.*

For conversion.

Although it has been held that an executor or administrator may recover either in his representative capacity or individually upon a cause of action upon a contract made by him in his representative capacity (*Bingham v. Marine Nat. Bank*, 112 N. Y. 661; *Van Buren v. First Nat. Bank*, 53 App. Div. 80, 83, 65 N. Y. Supp. 703; aff'd, 169 N. Y. 610; *Spies v. Michelsen*, 2 App. Div. 226, 37 N. Y. Supp. 720, 73 N. Y. St. Repr. 394), yet the rule seems to be well settled that as to a cause of action for conversion, and probably as to any other cause of action which accrues to the personal representative of the decedent, as distinguished from a cause of action which accrued to the decedent, whether he prosecute it in his name individually or in his representative capacity, is to be deemed, for the purpose of the taxation of costs, an action by him individually, and if the action be brought in his representative capacity, and he be unsuccessful, costs may be taxed against him individually, without an application to the court. (*Buckland v. Gallup*, 105 N. Y. 453; *Bingham v. Marine Nat. Bank*, *supra*; *Mullen v. Guinn*, 88 Hun, 128, 34 N. Y. Supp. 625, 68 N. Y. St. Repr. 680. See, also, *Rooney v. Bodkin*, 93 App. Div. 431, 435, and *Williamson v. Stevens*, 84 id. 518.) *Dunphy v. Callahan*, 126 App. Div. 11, 110 N. Y. Supp. 179; aff'd, 194 N. Y. 587.

Costs in actions to construe a will. See ¶ 72.

In an action to construe a will, costs may be allowed to those parties acting in a representative capacity but not to next of kin not interested. *Rothschild v. Goldenberg*, 103 App. Div. 235, 92 N. Y. Supp. 1076; mod'd, 188 N. Y. 327.

The Supreme Court has power to award costs to executors in an action to construe a will. *Douglas v. Yost*, 64 Hun, 155, 18 N. Y. Supp. 830, 45 N. Y. St. Repr. 850.

Costs in action to recover legacy.

In an action to recover the amount of a legacy where the defendant succeeds he is entitled to costs under section 1476

Civ. Pr. A., as a matter of right. *Ladies' U. B. Soc. v. Van Natta*, 96 App. Div. 99, 88 N. Y. Supp. 1083.

To guardian ad litem, in actions.

The law seems to be settled in this State by a long line of decisions that where an action is brought, the court has no power to award a guardian *ad litem* compensation, payable out of the estate, beyond the taxable costs, including additional allowances authorized by the statute; that any additional compensation must be made payable out of the interest of the infant, and that, where it turns out that the infant has no interest in the subject matter of the litigation, the guardian has to be content with the statutory costs and allowances. (*Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85; *Gott v. Cook*, 7 id. 521, 544; *Doremus v. Crosby*, 66 Hun, 125, 20 N. Y. Supp. 906, 49 N. Y. St. Repr. 808; *Downing v. Marshall*, 37 N. Y. 380; *Matter of Robinson*, No. 2, 40 App. Div. 30; aff'd, 160 N. Y. 448; *Matter of Farmers' Loan & Trust Co.*, 49 App. Div. 1, 63 N. Y. Supp. 227; *Brinckerhoff v. Farias*, 52 App. Div. 256, 65 N. Y. Supp. 358; *Illensworth v. Illensworth*, 110 App. Div. 399, 97 N. Y. Supp. 44; *Matter of Holden*, 126 N. Y. 589; *Matter of Pitney*, 186 id. 540; *Waldbridge v. Waldbridge*, 132 App. Div. 33, 116 N. Y. Supp. 239.)

Extra allowance.

In an action for the construction of a will an extra allowance cannot be made to counsel for infant defendants under sections 3252, 3253, Code Civ. Pro., now §§ 1512, 1513 Civ. Pr. A., where the infants have no part of the estate from which allowance can be made. *Hafner v. Hafner*, 34 Misc. Rep. 99, 69 N. Y. Supp. 460; *Walter v. Walter*, 60 Misc. Rep. 570, 113 N. Y. Supp. 897.

Costs, when parties not united in interest.

In actions at law where all the defendants have succeeded, those not united in interest who have appeared by different attorneys are entitled to costs. *Olifiers v. Belmont*, 67 N. Y.

St. Repr. 329, 33 N. Y. Supp. 623; *Lane v. Van Orden*, 11 Abb. N. C. 228.

In view of the nature of the action wherein such defendants, if liable at all, be liable severally, the determination in this regard as to their diversity of interest was sufficiently justified, and the right of costs since there was an appearance by separate attorneys was properly upheld. *Olifiers v. Belmont*, 15 Misc. Rep. 120, 71 N. Y. St. Repr. 836; aff'g, 67 id. 329; aff'd, 159 N. Y. 550.

Defendants not united in interest interposed separate answers by different attorneys, no evidence of bad faith — held, entitled to separate bills of costs. *Forrest v. Thompson*, 8 N. Y. St. Repr. 345; *D., L. & W. R. R. Co. v. Burkhard*, 40 Hun, 625, 2 N. Y. St. Repr. 184; *Wolf v. Di Lorenzo*, 22 Misc. Rep. 323, 49 N. Y. Supp. 191.

¶ 151 Costs and Allowances in Surrogates' Courts.

Distinction between allowance to executor or administrator and an award of costs against a party.

Previous to the Revised Statutes it was not the practice of the Surrogate's Court to give costs in favor of one party against another in testamentary matters. Costs were given by the ecclesiastical courts of England in such cases, both in original suits and on appeals, but it seems that such a practice was never adopted in this State.

By the Revised Statutes the Legislature changed the law in this respect and enacted the law as it existed in the ecclesiastical courts of England at the time of the settlement of this State. Although no fee bill was expressly adopted by statute for advocates and proctors in the Surrogate's Court, it was not the intention of the Legislature to leave it to the several surrogates to make an arbitrary allowance for services and counsel fees in each particular case, to be paid by one party to another, or out of the estate which is the subject of controversy, and without reference to the taxable costs allowed for similar services in other courts. In the taxation of costs

and counsel fees of the proctors and advocates upon the settlement of the account of an executor or administrator before the surrogate, the taxable charges therefor cannot exceed those which are allowed by law to solicitors and counselors in this court in similar cases. *Halsey v. Van Amringe*, 6 Paige, 12.

This last case recognizes the difference between allowances to be made to an executor for counsel fees as remuneration for services rendered and the taxable costs which may be awarded against one party in favor of another. In other words, it recognizes the difference between costs as such and the sum included in the account for services rendered by counsel. While it would not be proper for the surrogate to make an allowance to be charged against a contestant, it would be proper for the executor to pay his counsel such amount if justified by the proof as to services performed. To present the idea in a different form: Should the surrogate determine that one or other of the parties to the contest should be charged with costs of the proceeding, he could only charge him with the taxable costs at the rate specified by statute; and it would be improper to charge him with whatever sum might be a suitable reward for the attorney's services. This is in analogy with the procedure in common-law courts. A successful plaintiff, for instance, does not recover from the defendant for costs the entire sum which he, the plaintiff, may be required to pay his counsel, but only statutory costs. And it is elementary that costs are not intended as indemnity, but only partial reimbursement. *Matter of Smith*, 33 N. Y. St. Repr. 931, 12 N. Y. Supp. 88.

Costs in special proceedings.

Costs shall be awarded in special proceedings in surrogate's court solely in accordance with the following sections, and shall include all disbursements of the party to whom they are awarded, which might be taxed in the supreme court. The sum allowed for costs must be fixed by the surrogate, and inserted in the decree or order, and must be awarded to the party.

§ 275, *Sur. Ct. A.* · Former § 2743, *Code Civ. Pro.*

This section makes section 1492, Civ. Pr. A., inapplicable to special proceedings in Surrogates' Courts. That section provides for costs in all special proceedings where they are not "specially regulated." By this section they are now specially regulated. Decisions have heretofore fixed the rule that costs must be awarded to the party, and this section now contains that direction.

The surrogate is without power to award costs or make an allowance for any purpose unless expressly authorized to do so by the Surrogates' Court Act and especially by sections 275, 276 and 278. *Matter of Bush*, 106 Misc. Rep. 227, 175 N. Y. Supp. 653; *Matter of Ingraham*, 35 Misc. Rep. 577, 72 N. Y. Supp. 62; *Matter of Coonley*, 38 Misc. Rep. 219, 77 N. Y. Supp. 269; *Matter of Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795; *Matter of Hendel*, 106 Misc. Rep. 417, 176 N. Y. Supp. 262.

Under "Trading with the Enemy Act" and "Civil Rights Act."

No provision is made for allowing costs to attorneys representing the Alien Property Custodian, or to attorneys appointed to represent soldiers under the Civil Rights Act, and therefore, surrogates are without power to grant them costs or allowances as such officers. *Matter of Hendel*, 106 Misc. Rep. 417, 176 N. Y. Supp. 262; *Matter of Jurgenson*, 176 N. Y. Supp. 262; *Davison v. Lynch*, 103 Misc. Rep. 311, 171 N. Y. Supp. 46.

Allowed to party.

The allowance of costs must be made to the party and not to the attorney. *McMahon v. Smith*, 20 Misc. Rep. 305, 45 N. Y. Supp. 663; *Seaman v. Whitehead*, 78 N. Y. 306; *Walton v. Howard*, 1 Dem. 103; *Matter of Aaron*, 5 Dem. 362, 7 N. Y. St. Repr. 735; *Matter of Crane*, 68 App. Div. 355, 74 N. Y. Supp. 88; *Matter of Welling*, 51 App. Div. 355, 64 N. Y. Supp. 1025; *Matter of Reed*, 12 N. Y. St. Repr. 139; *Matter of Wright*, 121 App. Div. 581.

If he have more than one attorney he is not entitled to more costs for that reason. *Du Bois v. Brown*, 1 Dem. 317-330, 65 How. Pr. 461.

Costs to include disbursements.

Fees of expert witness above those allowed by section 1539, Civ. Pr. A., cannot be taxed as disbursements. *Matter of Bender*, 86 Hun, 570, 67 N. Y. St. Repr. 682, 33 N. Y. Supp. 907.

Stenographer's fees for furnishing minutes on contested probate must be incurred upon an order made before the hearing to enable such fees to be allowed as disbursements. *Matter of Engelbrecht*, 15 App. Div. 541, 44 N. Y. Supp. 551; *Matter of Byron*, 61 Hun, 278, 16 N. Y. Supp. 760, 40 N. Y. St. Repr. 845.

The successful party is entitled to recover disbursements without a certificate. *Larkins v. Maxon*, 103 N. Y. 680; *Lounsbury v. Sherwood*, 53 App. Div. 318, 65 N. Y. Supp. 676; *Niles v. Crocker*, 88 Hun, 312, 34 N. Y. Supp. 761, 68 N. Y. St. Repr. 579; *Hallock v. Bacon*, 64 Hun, 90, 19 N. Y. Supp. 91, 45 N. Y. St. Repr. 485.

¶ 152 Costs in Decree or Order; How Made Payable.

Costs; how made payable.

Except where special provision is otherwise made by law, costs, awarded by a decree or order may be made payable by the party personally, or out of the estate, or fund, or out of the share or interest therein of any person, or from both, in such proportion as the surrogate may direct, and justice requires.

§ 276, *Sur. Ct. A.* Former § 2744, *Code Civ. Pro.*

This section now gives discretion to the surrogate to apportion the costs between several funds or parties as justice requires. The restriction as to estates of less than \$1,000 is omitted.

Case where costs payable personally were justified. *Matter of Gabriel*, 44 App. Div. 623, 94 N. Y. St. Repr. 87, 60 N. Y. Supp. 87; aff'd, 161 N. Y. 644.

Costs on order.

The costs upon granting or refusing to grant an order, are in the discretion of the surrogate, and when allowed may be collected in the same manner as costs allowed upon granting or refusing to grant an order in the supreme court.

§ 277, *Sur. Ct. A.* Former § 2745, *Code Civ. Pro.*

Where application to open a decree is made and denied, an order is entered, and costs as on granting a decree are not allowed. *Pease v. Egan*, 3 Dem. 320.

¶ 153 Amount of Costs on Rendering Decree to be Fixed by Surrogate.**When surrogate to fix amount of costs.**

The surrogate, upon rendering a decree, may, in his discretion, fix such a sum as he deems reasonable, to be allowed as costs, to the petitioner, and to any other party who has succeeded in a contest, or whose attorney, in the absence of a contest, has rendered services in the proceeding of substantial benefit to him, or to the estate or fund, not exceeding, where there has not been a contest, twenty-five dollars, or where there has been a contest, seventy dollars; and, in addition thereto, where a trial or hearing upon the merits necessarily occupies more than one day, ten dollars for each additional day, necessarily occupied in the trial or hearing and in preparing therefor, and where a motion for a new trial is made, if it is granted, twenty-five dollars; if it is denied, fifteen dollars.

When the decree is made upon a contested application for probate of a will, costs, payable out of the estate or otherwise, shall not be awarded to an unsuccessful contestant of the will, unless he is a special guardian for an infant or incompetent, appointed by the surrogate, or is named as an executor in a paper propounded by him in good faith as the last will of the decedent; but where a person named as the executor in a will propounds the will for probate, such person so named as executor may, whether successful or not, in the discretion of the surrogate, be awarded costs and all necessary disbursements made by him and all expenses incurred in the attempt to sustain the will. The surrogate may order a copy of the stenographer's minutes to be furnished to the contestant's counsel, and test is made in good faith. § 278, *Sur. Ct. A.* Former § 2746, *Code Civ. Pro.* charge the expense thereof to the estate, if he shall be satisfied that the con-

A new provision has been inserted so that the surrogate may now do, as most surrogates have felt it wise and fair to do, that is, allow some costs to a party who would have succeeded had he made a contest, but who benefited all the persons interested by his services or those of his attorney without filing objections.

The amounts which can be allowed on an application for a new trial have been reduced.

Allowance of costs can now be made for all days more than one necessarily occupied in the trial or hearing and in preparing therefor.

The same provision for allowance of costs on unsuccessful probate has been retained, except that the special guardian for an incompetent person may have an allowance as well as the special guardian for an infant.

The surrogate may withhold costs from both or all parties. He may award them to the party who in his judgment is entitled to them, whether or not he is technically successful in obtaining a decree in his favor; if his behavior in the circumstances provoking the litigation, his situation in relation to the estate or the particular subject in controversy is such that it is equitable and just that he be remunerated for his expenses in the litigation. *Noyes v. Children's Aid Society*, 70 N. Y. 481.

The surrogate may determine to what parties costs shall be allowed, and the amount to be awarded to each within the limit of the section. *Matter of Collamer*, 5 N. Y. St. Repr. 196.

Contested probate. See ¶ 52.

Where the executor of a will is defeated on probate, it is within the discretion of the surrogate whether or not to award him costs. *Matter of Mondorf*, 110 N. Y. 450; *Collyer v. Collyer*, 110 id. 481.

An executor named in a will which has been admitted and the probate subsequently revoked is entitled to costs, if he has acted in good faith. *Bertine v. Hubbell*, 1 Dem. 335.

Award will not be set aside in the absence of clear proof of the abuse of discretion. *Matter of Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795.

An executor named in a prior will which has been probated,

may have his disbursements. *Matter of Waldron*, 74 Misc. Rep. 310, 133 N. Y. Supp. 1104.

Taxable costs.

Under former section 2561, in a will contest the surrogate could allow costs, in addition to disbursements, as he deemed reasonable, not exceeding \$70, and \$10 for each additional day where the trial occupied more than 2 days.

Under § 278, he has the same right except that 2 days is cut to 1 as to the trial, and in addition he may allow for "preparing for trial" the number of days he thinks "reasonable" based upon the proof submitted. *Matter of Hitchler*, 25 Misc. Rep. 369, 55 N. Y. Supp. 640.

The amount of costs allowed can not exceed the sum specified in the section. *Matter of Leon Mayer, Inc.*, 108 Misc. Rep. 662, 178 N. Y. Supp. 86; *Matter of Kreidler*, 68 Misc. Rep. 412, 124 N. Y. Supp. 628.

Appeal; abuse of discretion.

While under this section the granting or withholding of costs is in the discretion of the Surrogate, the plain abuse of that discretion by allowing costs to an executor who attempted to impose a false and fraudulent will upon the court, will be reversed by the appellate court. *Matter of Marshall*, 189 App. Div. 477, 178 N. Y. Supp. 711.

Amount allowed.

The allowance of \$25 is designed to cover all proceedings on an accounting where no trial is had, except for preparing the account. *Matter of Miles*, 5 Redf. 110.

Where the representative has been negligent in not rendering an account, and the account is incomplete and incorrect resulting in a contest, he will be allowed only the per diem fees for making the account and \$25 as in case of no contest. *Matter of Goetschius*, 3 Misc. Rep. 155, 23 N. Y. Supp. 975; *Matter of Woodard*, 13 N. Y. St. Repr. 161.

Against accounting party.

Costs charged against the accounting party because of negligence and incompetency. *Matter of Hartnett*, 15 N. Y. St. Repr. 725.

Costs on motion for new trial.

Upon a motion for a new trial made upon a case (§ 552, Civ. Pr. A.), full costs are allowed upon the order denying it. *Reid v. Gaedeke*, 38 App. Div. 107, 57 N. Y. Supp. 414; *Koepel v. Koepfel*, 50 Misc. Rep. 619, 98 N. Y. Supp. 215.

What is a contest.

There need not be a trial which requires taking of testimony to meet the requirement of a contest, but the facts being admitted and an issue raised will constitute a contest. *Matter of Hogarty*, 62 App. Div. 79, 70 N. Y. Supp. 839; modg., 34 Misc. Rep. 610, 70 N. Y. Supp. 428.

Notwithstanding a citation was issued, since no answer was filed and the only question was the propriety of the representative paying a claim — *held*, no trial or contest. *Matter of Rylance*, 25 Misc. Rep. 283, 55 N. Y. Supp. 433.

Costs on trial of claim by surrogate.

On trial of disputed claim by surrogate, costs are in the discretion of the surrogate limited by this section. *Matter of Coonley*, 38 Misc. Rep. 219, 77 N. Y. Supp. 269; *Matter of Ingraham*, 35 Misc. Rep. 577, 72 N. Y. Supp. 62.

Where a claim is heard and determined by the surrogate, the decree on judicial settlement should make an award of costs to the proper parties, under the authority of section 278, Sur. Ct. A. *Matter of Ingraham*, 35 Misc. Rep. 577. This decision also holds that former sections 1835 and 1836, Code Civ. Pro., should also govern the surrogate as to the conditions which admit of the allowance to the claimant, but in *Matter of Coonley*, 38 Misc. Rep. 219, 77 N. Y. Supp. 269, this view was not approved and the better practice followed of leaving the whole matter to the discretion of the surrogate.

In those counties where it is the practice to enter a special decree allowing or rejecting a claim, the costs are inserted in that, otherwise they are inserted in the decree on judicial settlement. It would seem to be good practice to make a separate decree allowing or rejecting the claim and fixing the costs, so that any appeal may be taken from that decree, and when the appeal is disposed of, the surrogate may make the proper decree of judicial settlement.

Appeal.

The award of costs is reviewable on appeal when it appears that the surrogate has abused his discretion. *Matter of Selleck*, 111 N. Y. 284.

¶ 154 Costs to Special Guardian of an Infant or Incompetent.

Costs may now be awarded to the special guardian of an infant or incompetent. The committee of a lunatic is not to be regarded as a special guardian. It is to a person "appointed," and not to one "regarded," that the award is possible. *Matter of Davis*, 60 Misc. Rep. 297, 113 N. Y. Supp. 287.

Compensation of special guardian.

A special guardian for an infant or incompetent shall receive a reasonable compensation for his services to be fixed by the surrogate, payable from the estate or fund, or from the interest of the ward therein, or from both in such proportion as the surrogate may direct.

§ 280, *Sur. Ct. A.* Former § 2748, *Code Civ. Pro.*

This section provides for compensation to a special guardian, and takes the allowance of costs out of the general section, (§ 278) since the special guardian is not a party to the proceeding. He is an officer of the court, and should be allowed reasonable compensation.

In the case of special guardian no restriction is imposed upon the surrogate in making such an allowance as his ser-

vices merit without a *per diem* or other limit. *Matter of Smith*, 26 Abb. N. C. 56, 33 N. Y. St. Repr. 929, 12 N. Y. Supp. 88.

Compensation of special guardian, out of the fund.

The appellate court has said regarding this amendment *In re Thaw*, 182 App. Div. 368, 169 N. Y. Supp. 434, where an allowance of \$1,000 each was made to three special guardians out of the fund in a proceeding involving the construction of a will:

“ This section has been the subject of no little judicial discussion. Mr. Surrogate Fowler, standing alone in this matter so far as we are aware, has condemned the section in no measured terms and has even questioned its constitutional validity. *Matter of O'Day*, 88 Misc. Rep. 408, 150 N. Y. Supp. 425. On the other hand, Mr. Surrogate Ketcham has, with equally vigorous insistence, upheld both the validity of the amendment, and the right of the Surrogate's Court under it, to make an allowance to a special guardian out of the corpus of an estate even where his ward has no present or vested interest in such corpus. *Matter of Fitter*, 100 Misc. Rep. 214, 165 N. Y. Supp. 406.

The criticism upon constitutional grounds by Surrogate Fowler is interesting, and if it were necessary to determine the question much might be said in favor of his view. As he points out the power apparently intended to be conferred upon Surrogates' Courts in the matter of allowances to special guardians is not only a reversal of the long-established policy of the State, but absolutely unlimited as to amount, thus conferring upon these courts a very much wider discretion than is vested in the Supreme Court, so that it is easy to conceive of a case in which an estate of moderate size might be seriously depleted if any surrogate should see fit to exercise his discretion unwisely or recklessly. The effect of the amendment, as it is sought to be construed is, in the language of the Court of Appeals (*Matter of Budlong*, 100 N. Y. 203), to take the amount of the allowances to special guar-

dians "from those who are entitled to the estate and transfer it to the pockets of the special guardians."

A critical examination of the section raises much doubt whether or not the Legislature intended to go so far as is claimed by the special guardians in this case. It is doubtless true that there have been cases in the past, and may be cases in the future in which the services rendered by a special guardian are valuable not alone to his immediate wards, but also to the estate as a whole, and in such cases the limitation upon the power to grant allowances, which obtained before 1914, might prevent his receipt of reasonable and proper compensation. See *Matter of Ludlow*, N. Y. Law Journal, July 27, 1899, per Varnum, Sur. The section of the Code which we are now considering may reasonably be construed as intended to apply to such cases. The language is that the allowances shall be "payable from the estate or fund, or from the interests of the ward therein, or from both in such proportion as the surrogate may direct." In our opinion this section should be so construed as to limit allowances to special guardians payable out of the estate, either in whole or in part, to cases in which the services of the guardian are shown to be of value not only to the immediate ward or wards, but also to the owners of the estate or fund out of whose pockets the allowance is to be taken.

In any case, since the discretion vested in the surrogate in this regard is so very wide, its exercise should be correspondingly conservative, and the amounts to be awarded should depend at least as much upon the value of the services rendered as upon the size of the estate. Whatever be the extent of the discretion thus vested in the first instance in the surrogate, it is a legal and not an arbitrary discretion and is subject to review. *Matter of Rutherford*, 103 Misc. Rep. 660, 170 N. Y. Supp. 1039.

DECISIONS UNDER FORMER PRACTICE, which will throw light on the duty of the court in awarding compensation.

Allowance of \$1,000 to special guardian of infant on con-

tested probate — *held* erroneous. *Matter of Budlong*, 100 N. Y. 203; *aff'g*, 33 Hun, 235.

Allowance of \$250 to a special guardian of an infant interested in an accounting where there had been a trial in which the special guardian succeeded was *held* erroneous.

As a general rule a special guardian of an infant cited may have an allowance for appearance, examination of account and of witnesses (if any are examined) whether or not he files objections or succeeds in a contest. *Matter of Meeker*, 9 Daly, 556; *Matter of Rasch*, 26 Misc. Rep. 459, 55 N. Y. Supp. 434.

Where contest is made and infant becomes of age after trial and appeal is taken, no allowance should be made for service of special guardian on appeal. *Matter of Keeler*, 23 Abb. N. C. 376, 26 N. Y. St. Repr. 90, 7 N. Y. Supp. 199.

The allowance should be made and inserted in the decree of probate, not applied for after decree. *Matter of Budlong*, 33 Hun, 235.

Costs to special guardian on appeal.

Application of special guardian to surrogate for costs on appeal in probate proceedings denied where the court above did not award costs to the special guardian. *Schell v. Hewitt*, 1 Dem. 249.

¶ 155 Decree Should Award Costs, and Fix Their Amount.

The award of costs in a decree is in the discretion of the surrogate, unless direction is given on appeal, and whenever allowed should be inserted in the decree or order.

It should also fix the amount allowed, and determine by whom or from what fund payment shall be made.

Costs against objector personally.

Surrogates' Courts still retain some of their old time characteristics in spite of the refinements of practice which have been continually superimposed upon them.

The justice dispensed in those courts has been highly regarded by the people generally, because a party interested

could call the attention of the court to his supposed grievance and have it investigated without the feeling that he was entering into an antagonistic litigation or one which would subject him to the payment of costs personally.

When a party interested files objections in good faith, and upon reasonable grounds, he should be entitled to have his objections investigated without subjecting himself to liability to pay costs. *Matter of Webb*, 194 App. Div. 915, 185 N. Y. Supp. 153.

Where administrators were substituted in place of a deceased contestant they are not personally liable for costs. *Matter of McLean*, 180 App. Div. 269, 167 N. Y. Supp. 656.

Decree may direct costs to be charged against individual parties.

Costs and disbursements of an accounting may be awarded against the representative personally. *Matter of Selleck*, 111 N. Y. 284; *Matter of Gabriel*, 44 App. Div. 623, 60 N. Y. Supp. 87; aff'd, 161 N. Y. 644.

Costs against sureties.

Where sureties file objections and do not sustain them costs may be allowed against them. *Matter of Adams*, 51 App. Div. 619, 64 N. Y. Supp. 591; aff'd, 166 N. Y. 623.

Costs after trial by jury.

It is provided that in every instance where a trial by jury is had, the Surrogate's Court enters the decree founded upon the verdict or decision of the trial court. See §§ 17, 68, 149.

When the decree is to be entered the Surrogate's Court under this section grants costs in accordance therewith.

Costs to successful contestant on construction. See ¶ 150.

Where an issue is made as to construction of a will a contestant who succeeds upon that issue may have costs, under section 278, although he be an unsuccessful contestant of the will itself. *Matter of Bogart*, 46 App. Div. 240, 61 N. Y. Supp. 671.

¶ 156 Additional Allowance on Judicial Settlement. Allowance on Sale of Real Property.

Additional allowance in settling account.

In addition to the sums specified in the last section, the surrogate may, in his discretion, allow to an executor, administrator, guardian, or testamentary trustee, upon a judicial settlement of his account, or on an intermediate accounting required by the surrogate, such a sum, as the surrogate deems reasonable, for his counsel fees and other expenses, not exceeding ten dollars for each day necessarily occupied in preparing his account for settlement and in drawing, entering and executing the decree.

§ 279, *Sur. Ct. A.* Former § 2747, *Code Civ. Pro.*

Allowance may cover time used in drawing, entering and executing the decree. The time required for making payments under the decree, obtaining releases and discharges, is often considerable, and has not heretofore been recognized in making the allowance.

The *per diem* allowance is not granted to the representative for his personal services, but to enable him to employ counsel if necessary. *Matter of Peyser*, 5 Dem. 244, 5 N. Y. St. Repr. 334.

This section does not limit the amount which may be paid to counsel for services on the accounting, provided such payment is made and included in the account and separated from other charges so that its reasonableness may be passed upon by the surrogate. *Matter of Mitchell*, 39 Misc. Rep. 120, 78 N. Y. Supp. 976. *Matter of Smith*, 26 Abb. N. C. 56, 12 N. Y. Supp. 88; *Harward v. Hewlett*, 5 Redf. 330; *Carroll v. Hughes*, 5 Redf. 337.

Allowance of counsel fees on judicial settlement.

It is a common practice among attorneys to ask for an allowance on judicial settlement which shall not only compensate them for their services on the judicial settlement but which shall pay for general services rendered to the executor or administrator before such accounting. Such course is not warranted in law and is bad in practice. If the representative of an estate shall employ counsel, which he clearly has the right to do, it is the duty of such counsel to present his ac-

count for payment before the final accounting, and for the representative to fix upon the amount which is reasonable to be paid, and pay it on his own responsibility, and credit himself with such payment in his final accounting. This will enable the executor in the first place to scrutinize the charges, and will give the parties in interest an opportunity to interpose objections if they shall appear to be exorbitant. *Osborne v. McAlpine*, 4 Redf. 1.

However eminent may be the counsel who renders legal services, in a proceeding in this court, for any other party than an executor, an administrator, a guardian, or a testamentary trustee, the maximum amount which can be taxed for those services, in favor of his client or for his own benefit, is the sum of \$70, together with ten times as many dollars as there have been days, less one, necessarily occupied in the trial or hearing. Precisely the same limitations apply also to executors, administrators, guardians, and testamentary trustees, except that, upon the final accounting of such officers, they may be awarded in addition not more than \$10 for each day employed in the trial and necessarily occupied in preparing therefor and in arranging and setting out the account.

What are days "necessarily occupied" was discussed in the Court of Appeals in the case of *Higbie v. Westlake* (14 N. Y. 281), which put a construction upon a statute not unlike that now under consideration.

The statute of 1844 allowed to an executor or administrator, who should superintend the sale of his decedent's real estate for the payment of debts, "a compensation not exceeding \$2 a day for the time necessarily occupied in such a sale."

The Court of Appeals held that an administrator, who claimed that he had been engaged for 140 days, in executing an order of the surrogate to sell certain property of his intestate, could only be granted an allowance for such days as were actually and necessarily occupied in the matter. Says Denio, J., pronouncing the opinion of the court: "The statute contemplates only an allowance for time necessarily and ac-

tually occupied about the sale. It does not warrant the idea, which seems to have been entertained by this administrator, that he was upon a salary from the commencement to the conclusion of the business."

The words "necessarily occupied" must be held to have precisely the same force and effect in sections 278, 279 of the Act, which they were decided to have in the statute of 1844, as interpreted by the Court of Appeals. An attorney, no more than an administrator, can fairly be said to have been "necessarily occupied" any number of days in the business of the estate, unless his devotion to such business during that time was substantially to the exclusion of other employment, and was essential for the proper discharge of his duties. He has certainly not been employed that number of days, within the meaning of the section, although on each of such days he may have rendered some slight service, if his time has mainly been occupied in other pursuits."

No allowance to parties appearing generally.

No allowances should ever be made in this court to counsel representing legatees or next of kin, to be charged against the body of the estate, where such appearance has only been in the interest of their particular client, for the purpose of examining the account, and no objections are filed, and the account is found correct. Such appearance should be held to be in the interest of the particular party, and not for the benefit of the whole estate. The only allowances made against the body of the estate should be to the counsel for the executor or administrator and any special guardian necessarily appearing in the case, except where legatees or next of kin shall file objections and sustain them, or some portion of them, or render valuable services for the benefit of the whole estate. *Osborne v. McAlpine*, 4 Redf. 1; *Matter of Holden*, 126 N. Y. 589.

Additional allowance by Supreme Court.

Where a judicial settlement is had in the Supreme Court, that court not being restricted by section 279, has power to

make an allowance to defray expenses necessarily incurred by a trustee in the faithful performance of the duties of the trust including a judicial settlement of his accounts.

This power exists in the Supreme Court, where its exercise in behalf of the testamentary trustees has been sustained upon the principle:

“That persons acting en autre droit, as executors, administrators, trustees, guardians, receivers, etc., are, upon a faithful execution of their trusts, to be indemnified out of the trust property, for all expenses necessarily incurred in the faithful performance of their duties.” *Downing v. Marshall*, 37 N. Y. 380, 388.

The same rule has been applied in favor of executors in a case where it was held to warrant the allowance of counsel fees as a part of the expenses of the trust. *Wetmore v. Parker*, 52 N. Y. 450, 466. Its existence was recognized more recently in *Matter of Application of Holden*, 126 N. Y. 589.

In such cases there should be evidence of the value of the services upon which the judgment of the court as to value can be based. *In re Maxwell*, 218 N. Y. 88, 112 N. E. 575.

Allowance upon sale of real property.

Upon the disposition of real property of a decedent, as prescribed in this act, the executor or administrator disposing of the property, must be allowed by the surrogate out of the proceeds of the sale brought into court, his commissions and expenses; and such a further sum as the surrogate thinks reasonable, for the necessary services of his attorney and counsel therein.

§ 281, *Sur. Ct. A.* Former § 2749, *Code Civ. Pro.*

¶ 157 When Security for Costs Will be Ordered.

Security for costs.

In any proceeding where an issue is raised by answer or objection by or on behalf of a non-resident of the State of New York against the proponent of a will, or an executor, administrator or trustee, or where the probate of a will has been tried before a jury which has disagreed, such proponent, executor, administrator or trustee shall be entitled in the discretion of the surrogate to have the person or persons raising such issue give security for costs.

§ 282, *Sur. Ct. A.* Former § 2750, *Code Civ. Pro.*

On account of the provision for the trial by jury of a probate case, and the possibility that there might be one or two

disagreements and the trial made expensive, this section has been inserted making it possible to have security for costs in such cases.

This section is an enlargement of the general power to require security for costs as it refers to a particular class of cases only. Sections 1522-1531 Civil Practice Act regulate security for costs and section 1531 makes such sections apply to special proceedings in courts of record.

Section 282 is constitutional. *Matter of Potter*, 157 N. Y. Supp. 1142.

Application for security should be made by notice of motion in the pending proceedings.

Nonresident second cousins who were only interested in a small parcel of real estate and who had filed objections to probate were required to give security for costs. *Matter of Gilder*, 162 N. Y. Supp. 413.

An official of another State (comptroller) required to give security for costs where he was owing costs given against him in another proceeding in the same estate. *Matter of Kopp*, 162 Misc. Rep. 506, 169 N. Y. Supp. 324.

Security for Costs in Actions by and Against Executors, etc.

In an action by or against an executor or administrator, in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue, or to be sued; or by an official assignee, the assignee of a receiver, or the committee of a person judicially declared to be incompetent to manage his affairs; the court, in its discretion, may require the plaintiff to give security for costs.

§ 1523, *Civ. Pr. A.* Former § 3271, *Code Civ. Pro.*

Suit brought under ancillary letters, no assets in this State but cause of action, no bond having been required of the ancillary administrator, security for costs required. *Hilgenberg v. Gt. East. C. & T. Co.*, 144 App. Div. 411, 129 N. Y. Supp. 240.

Where an action was brought by an administrator to recover possession of bank-books, the surrogate exercised his discretion and refused to order plaintiffs to file security for

costs and his order was affirmed. See § 1523 Civ. Pr. A. *Kelly v. Madigan*, 88 App. Div. 138, 84 N. Y. Supp. 331.

Additional security. § 1528, Civ. Pr. A.

A further undertaking may be ordered. *Banes v. Rainey*, 192 N. Y. 286; revg. 124 App. Div. 583.

Security for costs in actions for negligently causing death. See ¶ 417.

Security from an administratrix suing to recover damages for death of husband will not be ordered unless bad faith is shown. *Davidson v. Bose*, 57 App. Div. 212, 68 N. Y. Supp. 316; *McNeil v. Merriam*, 57 App. Div. 164, 68 N. Y. Supp. 165.

Where the administrator and all the next of kin are non-residents and there are no assets in the State, security for costs will be required. *Meaney v. Post & McCord*, 117 App. Div. 563, 102 N. Y. Supp. 611.

In *Schmalz v. Crow Con. Co.* (146 App. Div. 623, 131 N. Y. Supp. 398), the order was granted even though the testator had a small sum of money on deposit in this State.

¶ 158 Costs on Appeal and on Making Decree After Appeal.

Costs of appeal.

The appellate court may award to the successful party the costs of the appeal; or it may direct that they abide the event of a new trial, or of the subsequent proceedings in the surrogate's court. In either case, the costs may be made payable out of the estate or fund, or personally by the unsuccessful party, as directed by the appellate court; or, if such direction is not given, as directed by the surrogate.

The costs of an appeal, when they are awarded in a surrogate's court, are the same as if they were awarded in the supreme court.

§ 283, *Sur. Ct. A.* Former § 2751, *Code Civ. Pro.*

For the amount of costs on appeal see section 1508, Civ. Pr. A.

Costs on appeal from order.

Where the appeal is from a final order in a special proceeding, section 1492 Civ. Pr. A. applies, and the costs should be

taxed at the rates allowed upon an appeal from a judgment taken to the same court and in like manner. It is not necessary in such a case to specify that disbursements, as well as costs, are awarded, for under the provisions of section 1518, Civ. Pr. A., the award of costs carries with it certain disbursements therein particularly specified. *Matter of Babcock*, 86 App. Div. 563, 83 N. Y. Supp. 1020.

Where the Appellate Division has reversed an order of the surrogate in a transfer tax matter and dismissed the proceeding the surrogate allowed costs in the Appellate Division \$60. *Matter of Wright*, 89 Misc. Rep. 108.

Motion to dismiss appeal.

Where a motion is made to dismiss an appeal, but by direction of the court such motion is heard upon the regular argument of the appeal, and the appeal is dismissed, full costs are allowed. *Matter of Wray Drug Co.*, 93 App. Div. 456; *Matter of Nason*, 53 Misc. Rep. 187, 104 N. Y. Supp. 601; *Dooley v. Union Ry. Co.*, 57 Misc. Rep. 145, 107 N. Y. Supp. 882.

Costs upon making decree after appeal.

Costs after appeal must be awarded in the decree in accordance with the directions of the appellate court, but where the appellate court fails to award costs, the surrogate may award them. *Schell v. Hewitt*, 1 Dem. 249.

Where the matter of costs is not determined by the appellate court, they rest in the discretion of the surrogate. *Matter of Campbell*, 48 Hun, 417, 16 N. Y. St. Repr. 483, 1 N. Y. Supp. 231.

The surrogate's power to direct as to costs on appeal applies only to the source from which they are to be paid, and does not authorize him to award costs where none are allowed in the appellate court. *Schell v. Hewitt*, 1 Dem. 249. *Matter of Wilson*, 103 N. Y. 374; *Matter of Budlong*, 100 id. 203; aff'g, 33 Hun, 235.

When the Court of Appeals awards to a party costs in the trial court the award carries with it not only the taxable costs and taxable disbursements, but such further sum (if any) by way of extra allowance as that court, in the exercise of a sound discretion, may award. *Hascall v. King*, 165 N. Y. 288.

Payable personally.

Costs imposed upon the appellant personally. *Matter of Martin*, 98 N. Y. 193.

Where executors prosecute an appeal upon the question of commissions for their own benefit, they should pay costs personally. *In re Bennett's Est.*, 42 N. Y. Supp. 674; reported below, *Matter of Clinton*, 16 Misc. Rep. 199, 74 N. Y. St. Repr. 534.

Allowing more than one bill of costs.

Costs allowed on appeal, *held* to be taxable by all parties and not to the successful party only. *Lawrence v. Lindsay*, 70 N. Y. 566.

Remittitur gave "Cost of appeal to respondents," and upon entry of decree separate bills of costs were applied for by proponent, contestant, and special guardian. Denied as to proponent and special guardian, the former because he was not a "respondent," and the latter because he was not appointed in the appeal proceedings by the appellate court and because the decision did not direct that he be allowed costs. *Matter of Bull*, 22 N. Y. St. Repr. 880 (Sur. N. Y.), 6 N. Y. Supp. 565.

"Costs to the respondents" in Court of Appeals does not mean "costs to each respondent." *Van Gelder v. Van Gelder*, 84 N. Y. 658.

Remittitur recited that the order was reversed "with costs." The order entered upon the remittitur at Special Term granted "costs to each of the appellants"—*held* unauthorized by the remittitur. *Isola v. Weber*, 12 App. Div. 267, 42 N. Y. Supp. 615; *Matter of Kinn*, 139 App. Div. 766, 124 N. Y. Supp. 569.

Where the respondents represent wholly distinct and separate issues and the Court of Appeals allows "Costs to the respondents," each is entitled to a separate bill. *Reynolds v. Aetna L. I. Co.*, 30 Misc. Rep. 152, 61 N. Y. Supp. 901.

Equity action — all defendants join in one appeal — reversal "with costs" seemingly — *held*, only one bill of costs, but in the opinion it seems to have been declared that each defendant should have had separate bills. *Sweet v. City of Syracuse*, 49 N. Y. St. Repr. 262; *aff'd*, 53 *id.* 87.

Costs of defending an appeal from a final decree cannot be allowed out of the balance found on hand by such decree.

Where a representative defends an appeal from a final decree on judicial settlement there seems to be no provision whereby the surrogate may allow such expenses from the fund adjudged by the decree to be on hand for distribution. Such jurisdiction is conferred upon the appellate court, and the surrogate can only enter such an order as he is commanded to enter by such court. *In re McEchron*, 55 App. Div. 147, 67 N. Y. Supp. 18; *Matter of Varet*, 106 Misc. Rep. 443, 173 N. Y. Supp. 559.

Award of costs in appellate court on appeal from a decree includes disbursements.

Section 1518, Civ. Pr. A., which says that a party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements, applies by analogy to appeals from decrees of Surrogates' Courts, but not to appeals from orders. *Matter of Perry*, 131 App. Div. 284, 115 N. Y. Supp. 744.

Where costs to the representative are refused on appeal, such refusal includes expenses and disbursements for attorney fees, and the surrogate has no right to reimburse such representative from the funds of the estate. *In re McEchron*, 55 App. Div. 147, 67 N. Y. Supp. 18.

As to the duty of the surrogate when the Court of Appeals

has affirmed upon questions of law, see *Matter of Hopkins*, 41 Misc. Rep. 83; aff'd, 93 App. Div. 618.

Where an order of the surrogate is reversed "with costs" no disbursements can be included in the costs to be taxed by the surrogate. *Matter of Bolte (Steencken)*, 58 App. Div. 85, 68 N. Y. Supp. 444; *Matter of Moran*, 60 Misc. Rep. 298, 113 N. Y. Supp. 276.

Cost of stenographer's minutes required by the respondent to enable him to make amendments to the case may be taxed, unless the appellant tenders the minutes for use of the respondent. *Bremer v. Manhattan Ry. Co.*, 51 Misc. Rep. 96, 99 N. Y. Supp. 746; aff'd, 115 App. Div. 900; *Starkweather v. Sundstrom*, 113 App. Div. 401, 98 N. Y. Supp. 1086.

Costs in a special proceeding; appeal.

Costs in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding, taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party, in the discretion of the court, at the rates allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner.

§ 1492, *Civ. Prac. A.* Former § 3240, *Code Civ. Pro.*

CHAPTER XXXIII.

Proceedings on Appeal from an Order or Decree of the Surrogate's Court.

- ¶ 159. Jurisdiction of appellate division.
- § 290. How parties to appeal designated.
- ¶ 160. § 592. Appeal to court of appeals.
- ¶ 161. § 288. Who may take an appeal to the appellate division.
- ¶ 162. When an appeal may be taken from an order.
- ¶ 163. Appeal from order of surrogate under transfer tax act.
- ¶ 164. § 289. Necessary parties to an appeal.
- § 292. Effect of death.
- ¶ 165. § 293. When appeal must be taken; serving notice.
- ¶ 166. § 294. Appeal may be on law or facts.
- ¶ 167. Making case and exceptions.
- ¶ 168. Settling, amending and serving.
- ¶ 169. § 298. Security required to perfect appeal.
- § 299. To stay execution.
- § 300. To stay commitment.
- ¶ 170. § 301. Amount and requisites of undertaking.
- Action thereon.
- § 304. Filing undertaking.
- § 302. Undertaking waived.
- § 303. Deposit in lieu of undertaking.
- § 305. Insolvent sureties.
- ¶ 171. § 309. Power of appellate court; further testimony.
- § 310. Proceedings after decision.
- ¶ 172. § 497. Enforcing affirmed or modified decree or order.
- § 498. Cancelling docket on reversal.
- § 587. Restitution.
- § 297. Curing defects in proceeding.
- § 161. Action on undertaking.

¶ 159 Jurisdiction of Appellate Division on Appeal From Surrogates' Decrees.

The jurisdiction of the Appellate Division upon appeals from decrees of the Surrogates' Courts deciding issues of fact is essentially different from that possessed by that court on appeals from judgments in ordinary actions. Section 40, Sur. Ct. A., added in 1914, has greatly enlarged the jurisdic-

tion of the Surrogate's Court to determine collateral questions of fact arising in accounting proceedings, and many important appeals from decisions made pursuant to this new provision must come before the Appellate Division.

The distinctive feature of the jurisdiction of the Appellate Division, where an appeal is taken from a surrogate's decree upon the facts, is, that the appellate court, upon such appeal, has the same power to decide questions of fact that the surrogate possesses, and may even in its discretion receive further testimony. Although the facts are disputed, it need not, on reversing the surrogate's decree, send the matter back for a new trial, but may itself finally decide the issue of fact. See § 309, ¶ 171.

The appellate court referred to in these sections is the Appellate Division and not the Court of Appeals. *Matter of Ross*, 87 N. Y. 514.

The appointment of the special guardian in or by the appellate court is not necessary. The original appointment continues through all appellate courts. *Matter of Stewart*, 23 App. Div. 17, 48 N. Y. Supp. 999.

Parties to appeal; how designated; title of cause.

The party or person appealing is designated as the appellant, and the adverse party as the respondent. After an appeal is taken to another court, the name of the appellate court must be substituted, for that of the court below, in the title of the proceeding, and in any case, the name of the county, if it is mentioned, may be omitted; otherwise the title shall not be changed, in consequence of the appeal. § 290, *Sur. Ct. A.* Former § 1295, *Code Civ. Pro.*

The determination of the validity and regularity of an appeal from Surrogate's Court must be submitted to the appellate tribunal, the surrogate having no jurisdiction in the premises. *Matter of Haynes*, 2 Dem. 158.

After an appeal duly made the surrogate has no power to entertain an application to open the decree or to resettle it. *Matter of May*, 24 N. Y. St. Repr. 888; *Matter of Westerfield*, 61 App. Div. 413, 70 N. Y. Supp. 641.

¶ 160 Appeal to Court of Appeals and Appellate Division.

For the practice relating to appeals to the Court of Appeals consult section 588 et seq., Civil Practice Act. In 1917 new and further limitations on the right to appeal to the Court of Appeals were made, and this must be borne in mind when consulting cases upon the right to go to that court.

Appeals from Surrogate's Courts are regulated by sections 288 to 310 of the Surrogates' Court Act, but these sections do not apply to appeals from the appellate division to the Court of Appeals which are provided for in sections 588 to 607 of the Civil Practice Act. There are also general provisions relating to appeals to be found in sections 557 to 587, Civil Practice Act.

An appeal cannot be taken from the decree of the Surrogate's Court entered upon the decision of the Appellate Division, but must be from the order of the Appellate Division itself. To state in the notice of appeal that it is intended to bring up for review the order of the Appellate Division will not save the appeal. *Matter of Union T. Co.*, 172 N. Y. 494.

An order of the Appellate Division which sends a probate case back to the surrogate for a rehearing is not appealable to the Court of Appeals as a final order or decree. *Matter of Gibson*, 195 N. Y. 466.

Limitation of time to appeal.

An appeal to the court of appeals must be taken within sixty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from and a written notice of the entry thereof except that the party entering the judgment or order, or serving the notice of entry thereof, shall not be entitled to further notice to limit his time to appeal.

§ 592, *Civ. Pr. A.* Former § 1325, *Code Civ. Pro.*

Notice of appeal to the court of appeals.

* * * Upon an appeal to the court of appeals from an order of the appellate division, made upon an appeal from the surrogate's court, the notice of appeal shall be filed with the clerk of the surrogate's court.

Part of § 532, Civ. Pr. A. Former § 1300, *Code Civ. Pro.*

¶ 161 Who May Take an Appeal to the Appellate Division.

Appeal; when and to what court it may be taken.

An appeal to the appellate division of the supreme court may be taken from a decree of a surrogate's court, or from an order affecting a substantial right, made by a surrogate, or by a surrogate's court in a special proceeding, by any party aggrieved thereby, except where the decree or order was rendered or made upon his default in appearing.

§ 288, *Sur. Ct. A.* Former § 2754, *Code Civ. Pro.*

Executor may appeal.

The executor named in a will or codicil which is denied probate becomes a "party aggrieved" because he is charged with the duty of probating the instrument by virtue of which he receives his office, and thus he is entitled to appeal from a decree which ousts him from the exercise of such functions, and which denies to the beneficiaries whom he represents the right to receive the property as set forth in the will or codicil. *Matter of Rayner*, 93 App. Div. 174, 87 N. Y. Supp. 23.

This principle was fully recognized in *Bryant v. Thompson* (128 N. Y. 426), wherein the court defined a party aggrieved as one "having an actual and practical, as distinguished from a mere theoretical interest in the controversy." And in *Bliss v. Fogg* (27 N. Y. Supp. 1053; *S. C.*, *sub. nom. Bliss v. Fosdick*, 76 Hun, 508), it was held (head note) that "where judgment is rendered for defendants in an action by executors to compel a transfer to them of certain property, the executors are parties 'aggrieved' within § 288."

In considering similar language in *Green v. Blackwell* (32 N. J. Eq. 768, 772), where the statute there gave an appeal to "all persons aggrieved," the court said: "Whoever stands in a cause as the legal representative of interests which may be injuriously affected by the decree made is, within the meaning of these laws, aggrieved and, therefore, may appeal." A codicil is a part of the will. It is executed with the same formalities; and the testamentary disposition sought by it to be made is treated and is the same as though the provisions were

actually incorporated in the body of the will itself. The codicil, in fact, is a will, and is to be carried out by the executors named in the will; and, therefore, the same rules apply as would apply to rights of parties acquired under a will. *Matter of Stapleton*, 71 App. Div. 1, 75 N. Y. Supp. 657.

Party aggrieved.

A person interested who appears and examines witness and takes objections and exceptions will be considered to have made himself a party to the proceedings. *Matter of Hannah*, 11 N. Y. St. Repr. 807.

An executor who has called his coexecutor to account has no duty to others to appeal from the decree except in so far as his own rights are affected. *Matter of Hodgman*, 140 N. Y. 421; aff'g, 68 Hun, 484. See also 11 App. Div. 344, 42 N. Y. Supp. 1004; aff'd, 161 N. Y. 627.

A special guardian who is awarded compensation in a decree may appeal from the decree although he has accepted the allowance. *Matter of Edwards*, 110 App. Div. 623, 97 N. Y. Supp. 185.

A trustee may not be a party aggrieved when the decision affects adults, but he is such when it affects infants. *Matter of Stevens*, 114 App. Div. 607; revg. 46 Misc. Rep. 623, 95 N. Y. Supp. 297; aff'd, 188 N. Y. 589.

An administrator *cum testamento annexo* cannot appeal from a decree settling the account of the deceased executor in relation to a trust fund, etc., when the beneficiaries are of full age and were represented and did not appeal. *Matter of Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795.

An executor is not a "party aggrieved" where the question at issue is whether a legatee or the residuary legatee is entitled to a certain bequest. *Matter of Coe*, 55 App. Div. 270, 66 N. Y. Supp. 784; *Matter of Mayer*, 84 Hun, 539, 66 N. Y. St. Repr. 324, 32 N. Y. Supp. 850; *Bryant v. Thompson*, 128 N. Y. 426.

A creditor appointed administrator cannot appeal in his

representative capacity from a decree determining who is entitled to surplus after payment of debts. *Matter of Heldmann*, 151 App. Div. 234, 135 N. Y. Supp. 143.

Appeal by person not a party.

An administrator *de bonis non* may prosecute or defend an appeal originating with his predecessor. Decedent Estate Law, § 115.

Default.

The right to appeal is confined to a person who was a party to the proceeding and who has appeared and who is aggrieved by the order or decree. A party who comes into court in response to the citation and does not sign and file a notice of appearance has no standing on the record and is not entitled to take an appeal. *People v. Fitzgerald*, 73 App. Div. 339, 76 N. Y. Supp. 865.

A person interested who has not been made a party may apply to be made a party for the purpose of appealing. See ¶ 164.

An application to be made a party must be made to the appellate court, and he must show that he has an interest to be protected.

A person aggrieved who is not a party but is entitled by law to be substituted in place of a party, or who has acquired since the making of the order or decree appealed from an interest which would have entitled him to be so substituted if it had been previously acquired, may also appeal, * * *. But the appeal cannot be heard until he has been substituted in place of the party, and if he unreasonably neglects to procure an order of substitution, the appeal may be dismissed upon motion of the respondent. § 291, *Sur. Ct. A. Former* § 1296, *Code Civ. Pro.*

¶ 162 When an Appeal May be Taken From an Order.

Substantial right.

An order denying the application of a person having no interest in the fund to intervene does not affect a substantial right. *Matter of Halsey*, 93 N. Y. 48.

An order adjudging, against the denial of an administrator, that there are assets in his hands and requiring him to account therefor is an order affecting a substantial right. *Matter of Gilbert*, 104 N. Y. 200; aff'g, 39 Hun, 61.

An order directing a representative to account is not appealable. He may fail to account and let a warrant of attachment be ordered and then appeal. *Matter of Callahan*, 139 N. Y. 51.

An order granting leave to amend objections does not affect a substantial right. *Matter of Burnett*, 15 N. Y. St. Repr. 116.

An order amending a citation by adding "as executor" to the name of a person cited does not affect a substantial right. *Matter of Soule*, 46 Hun, 661, 12 N. Y. St. Repr. 692; aff'd, 109 N. Y. 662.

A denial of a motion to eliminate from the proceedings the names of certain persons claimed not to be interested does not affect a substantial right. *Matter of Nottingham*, 88 Hun, 443, 34 N. Y. Supp. 404, 68 N. Y. St. Repr. 393.

What may be reviewed.

That part of a decree which adjudges that an executor is not entitled to commissions by reason of misconduct is reviewable. *Matter of Gall*, 107 App. Div. 310, 95 N. Y. Supp. 124.

An order appointing a referee is not subject to review. *Matter of Pearsall*, 21 N. Y. St. Repr. 305, 4 N. Y. Supp. 365.

A direction or opinion made or given by the surrogate and not duly entered is not an order from which an appeal can be taken. *Matter of Callahan*, 66 Hun, 118, 49 N. Y. St. Repr. 425, 20 N. Y. Supp. 824; app. dism., 139 N. Y. 51.

What notice of appeal from report of referee brings up intermediate orders. *Matter of Lawson*, 42 App. Div. 377, 59 N. Y. Supp. 152.

An appeal may be taken from an order taxing the fees of appraisers. *Matter of Harriot*, 145 N. Y. 540; revg. 63 N. Y. St. Repr. 871, 30 N. Y. Supp. 1132.

Discretionary order.

By section 288 it is provided that an appeal may be taken to the Appellate Division from a decree of a Surrogate's Court or from an order affecting a substantial right, made by a surrogate or by a Surrogate's Court in a special proceeding. In *Matter of Selleck* (111 N. Y. 284), notwithstanding the equivocal language of certain sections of the Code, it was determined that the former General Term had the right in certain cases to review discretionary orders made by a surrogate or a Surrogate's Court. To like effect is *Matter of Adler*, 60 Hun, 481.

The appellate court has the power to review a discretionary order of the surrogate or the Surrogate's Court and determine whether or not there has been an abuse of discretion so as to work substantial injury, and so an order denying an application to open a decree has been reversed. *Matter of Doig*, 125 App. Div. 746, 748, 110 N. Y. Supp. 93.

¶ 163 Appeal From Order of the Surrogate Under Transfer Tax Act. See ¶¶ 7, 93.

Under section 230 of the Tax Law an appraiser is appointed to appraise the taxes payable to the State upon the death of a resident of the State. By section 231 it is provided that upon the presentation of the report of the appraiser, the surrogate shall forthwith, as of course, determine the cash value of all estates and the amount of tax to which the same is liable. This seems to be the act of the surrogate acting as an assessor upon advice given to him by the appraiser. The entry is made as of course, without notice or hearing. By section 232 it is provided that from this determination any party may appeal to the same surrogate who has made the prior order. That appeal is heard upon notice, and is a judicial determination of the amount of tax payable under the law.

It is clear that the only appeal authorized to the surrogate is an appeal from the order of the surrogate acting as an assessing officer. After such an appeal upon which he has

made his judicial determination there is no further appeal provided for to the surrogate. If either party is dissatisfied with the determination of the surrogate upon that appeal, his only remedy is to appeal to the Appellate Division. *In re Steinwender's Est.*, — App. Div. —, 158 N. Y. Supp. 779; *Hayes v. Consolidated Gas Co.*, 143 N. Y. 641; *Matter of Costello*, 117 App. Div. 807, 103 N. Y. Supp. 6.

The first appeal may be made from the first order to the surrogate, and from his second order, made after regular argument of the appeal, another appeal may be taken to the appellate division.

The executor as such is entitled to appeal from an order and decree fixing a transfer tax. He is made personally liable for the tax and is a party aggrieved. *Matter of Cornell*, 66 App. Div. 162-171, 73 N. Y. Supp. 32.

Notice of appeal.

The surrogate can not review a part of an order not appealed from or stated in the notice. *In re Reynolds*, 163 N. Y. Supp. 803. See also, 97 Misc. Rep. 555, 163 N. Y. Supp. 812.

Filing notice of appeal to surrogate.

Section 232 of the Tax Law prescribes how and within what time an appeal to the surrogate may be taken. The notice must be filed in the office of the surrogate within sixty days from the fixing of the tax, and if not so filed the surrogate has no jurisdiction to hear it. *Matter of Seymour*, 144 App. Div. 151.

No judge or court can extend the time for filing the notice. Civil Pr. A., § 99, § 297, Sur. Ct. A., ¶ 172.

An admission of service of notice of appeal does not waive the necessity for filing the notice. *Matter of Seymour*, 144 App. Div. 151, 128 N. Y. Supp. 775.

Only one appeal allowed.

The order fixing the transfer tax upon an estate is an entirety and a party claiming to be aggrieved thereby and tak-

ing an appeal should present upon that appeal every objection which he has to the order. It would lead to endless delay and confusion if he was permitted to take a separate appeal for each objection he had to the order of the surrogate. The practice in this class of cases has always been to consider only such objections as the appellant specifies and to affirm the order as a matter of course in all other respects. The specification of one or more objections is deemed equivalent to a concession that the appellant regards the decree in all other respects correct. It is in substance an appeal only from those parts to which objection is made, and after an appeal from one part of a decree a defeated appellant has never been permitted to appeal from other parts and so on piecemeal until he has obtained a review of the whole by successive appeals. *Matter of Cook*, 194 N. Y. 400.

Appeal to Appellate Division; motion to re-settle order.

Where no copy of an order, entered on a decision of the Surrogate's Court, reversing an order fixing a transfer tax, is served on the executor of the estate, and the order incorrectly recites the grounds of appeal and events on argument, the executor's remedy is by motion for resettlement, and not by application to vacate. *Matter of Seixas*, 173 N. Y. Supp. 766.

¶ 164 Necessary Parties to an Appeal; Effect of Death.

Who must be made parties.

Each party who has appeared in the special proceeding in the surrogate's court, must be made a party to the appeal. A person not a party, may be brought in by an order of the appellate court, made after the appeal is taken, in such manner as the order may prescribe.

§ 289, *Sur. Ct. A.* Former § 2755, *Code Civ. Pro.*

A special guardian must be made a party to an appeal and his office does not become extinct by the entry of the decree. *Matter of Stewart*, 23 App. Div. 17, 48 N. Y. Supp. 999.

On an appeal from an order appointing a guardian of an infant under fourteen years the infant need not be a party.

Matter of Van Vranken, 20 N. Y. St. Repr. 387, 3 N. Y. Supp. 445; *Underhill v. Dennis*, 9 Paige, 202.

Application to bring in parties. See ¶ 161.

The application to bring in necessary parties must be made to the appellate court and not to the surrogate. *Matter of Marks*, 128 App. Div. 775.

Such application should be made by motion in the appellate court. The former provision for making persons not parties to the original proceeding, parties to the appeal by the appellant, has been repealed.

Where some of the persons who ought to be parties to the appeal have not been brought in the appellate court will hold the appeal proceedings and direct them to be brought in. *Matter of Hunt*, 105 N. Y. Supp. 59.

Appeal when adverse party has died.

Where the adverse party has died, since the making of the order, or the entry of the decree, or the rendering of the judgment appealed from, or where the decree appealed from was rendered, after his death, in a case prescribed by law, an appeal may be taken, as if he was living; but it cannot be heard, until the heir, devisee, executor, or administrator, as the case requires, has been substituted as the respondent. In such a case, an undertaking required to perfect the appeal, or to stay the execution of the decree or order appealed from, must recite the fact of the adverse party's death; and the undertaking enures, after substitution, to the benefit of the person substituted.

§ 292, *Sur. Ct. A.* Former § 1297, *Code Civ. Pro.*

Proceedings, when party dies, pending appeal.

Where either party to an appeal dies, before the appeal is heard, or has heretofore died and the appeal has not been heard, if an order, substituting another person in his place, is not made, within three months after his death, or where he has heretofore died within three months after this section takes effect, the court, in which the appeal is pending, may, in its discretion, make an order, requiring all persons interested in the decedent's estate, to show cause before it, why the judgment or order appealed from should not be reversed or affirmed, or the appeal dismissed, as the case requires. The order must specify a day when cause is to be shown, which must be not less than six months after making the order; and it must designate the mode of giving notice to the persons interested. Upon the return day of the order, or at a subsequent day, appointed by the

court, if the proper person has not been substituted, the court, upon proof, by affidavit, that notice has been given, as required by the order, may reverse or affirm the judgment or order appealed from, or dismiss the appeal, or make such further order in the premises, as justice requires.

§ 307, *Sur. Ct. A. Former § 1298, Code Civ. Pro.*

Order of substitution upon death of party.

Where the appeal is from one court to another, an application for an order of substitution, as prescribed by sections 291, 292 and 307, must be made to the appellate court. Where personal service of notice of application for an order has been made, within the state, upon the proper representative of the decedent, an order of substitution may be made, upon the application of the surviving party.

§ 308, *Sur. Ct. A. Former § 1299, Code Civ. Pro.*

¶ 165 When Appeal Must be Taken; Serving Notice of Appeal.

Time to appeal; how taken.

An appeal must be taken within thirty days after the service, upon the appellant, or upon the attorney, if any, who appeared for him in the surrogate's court, of a copy of the decree, or order from which the appeal is taken, and a written notice of the entry thereof, except that the party entering such decree or order shall not be entitled to further notice to limit his time to appeal.

An appeal must be taken by the service upon each party to the appeal, other than the appellant, and upon the surrogate, or the clerk of the surrogate's court, of a written notice, referring to the decree or order appealed from, and stating that the appellant appeals from the same, or from a specified part thereof. Where a party to the special proceeding in the court below appeared in person, the notice of appeal must be personally served upon him; where he appeared by an attorney, it must be served personally, either upon him or upon his attorney.

§ 293, *Sur. Ct. A. Former § 2756, Code Civ. Pro.*

Entry and service of decree.

When one party enters the decree and serves it, his time to appeal is set running and it is not necessary that the adverse party should serve on the party entering the decree. *In re Loser*, — App. Div. —, 166 N. Y. Supp. 401, revg. *In re Flataner*, 165 N. Y. Supp. 414.

An order marked by the county clerk as " filed " is duly entered under the requirement of section 559, Civ. Pr. A. *O'Connor v. McLaughlin*, 80 App. Div. 305, 80 N. Y. Supp. 741.

To limit the time to appeal the notice served must state the

time of entry of the decree, and a statement that the decree is filed is not sufficient.

What is entry of a decree is defined in section 81, Sur. Ct. A. *Matter of Armstrong*, 32 N. Y. St. Repr. 441, 10 N. Y. Supp. 899; revg. 29 N. Y. St. Repr. 215, 9 N. Y. Supp. 443.

Where an attorney appears for two parties, the copy decree and notice of entry limits the time for appeal as to both parties although the attorney is described as attorney for one party only. *Matter of Heldmann*, 153 App. Div. 583, 138 N. Y. Supp. 59.

Notice of appeal. See §§ 294, 295.

Notice of appeal cannot be served by mail. *Matter of Williams*, 6 Misc. Rep. 512, 57 N. Y. St. Repr. 711, 27 N. Y. Supp. 433.

It is not required that the grounds of appeal shall be stated in the notice. *Matter of Stewart*, 135 N. Y. 413.

An appeal will be considered as raising questions of law only, unless the notice states that questions of fact are to be reviewed. *Matter of Gilman*, 92 App. Div. 462; aff'd, 178 N. Y. 606.

The time for filing a notice of appeal, or service upon the surrogate or clerk of the Surrogate's Court, or the adverse party can not be extended by the court. § 297 Sur. Ct. A., § 99 Civil Prac. Act. But where such filing or service is duly made, the court may allow the appeal to be perfected by doing any other act or acts necessary to perfect it.

¶ 166 Appeal May be Upon Questions of Law or Fact; Reversal.

Appeal may be on the law or the facts; case to be made; reversal.

The appeal may be taken upon questions of law, or upon the facts, or upon both. If it is taken from a decree rendered upon the trial by the surrogate, or by the surrogate and a jury, of an issue of fact, it must be heard upon a case, to be made and settled by the surrogate, as prescribed by law, for the making and settling of a case upon an appeal in an action.

Such appeal brings up for review, by each court to which the appeal is carried, each decision, to which an exception is duly taken by the appellant, as pre-

scribed in section 72. But such a decree or order shall not be reversed, for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby.

§ 294, *Sur. Ct. A. Former* § 2757, *Code Civ. Pro.*

See also § 295 as to bringing up each intermediate order specified in the notice of appeal.

Grounds for reversal.

The appellate court will disregard an error in the admission of testimony unless it appears that the exceptant was necessarily prejudiced thereby. *Matter of Miner*, 146 N. Y. 121; *aff'g*, 72 Hun, 568, 55 N. Y. St. Repr. 225, 25 N. Y. Supp. 537.

If the case is one in which findings are required to be made and there are no findings of fact in the case and no exceptions to the decision there is nothing to give the appellate court jurisdiction. *Matter of Sprague*, 125 N. Y. 732; *Hewlett v. Elmer*, 103 id. 156; *Matter of Kellogg*, 104 id. 648; *In re Daymon*, 47 App. Div. 315, 61 N. Y. Supp. 997; *In re Sherwood*, 75 App. Div. 342, 78 N. Y. Supp. 186.

In such a case the appellate court remits the case to the surrogate as an undecided cause, and does not dismiss the appeal and allows the decree to stand. *In re Sherwood*, 75 App. Div. 342.

In appeals from a decree of a surrogate, when the appellant seeks to review any fact by the surrogate, a case should be made containing the evidence. *Matter of Walrath*, 69 Hun, 403, 52 N. Y. St. Repr. 843, 23 N. Y. Supp. 648; *Spence v. Chambers*, 39 Hun, 193; *Burger v. Burger*, 111 N. Y. 523, 530; *Matter of Marsh*, 45 Hun, 109, 9 N. Y. St. Repr. 441.

Where no case is made there can be no review of the facts, and questions of law only can be presented on the appeal. *Matter of Clark*, 119 N. Y. 427.

Entering decision and appeal therefrom. See ¶ 32.

Where the decision is incorporated in the decree an appeal brings up for review every question decided by the Surrogate. *Buczynski v. Anderson*, 174 App. Div. 790, 161 N. Y. Supp. 697; *Matter of Amend*, 100 Misc. Rep. 90, 165 N. Y. Supp. 76.

Effect of exceptions.

Exceptions to findings of fact are not necessary to bring up the facts for review in probate cases. But where the appeal is upon the law the court will consider only such questions as have been raised by exceptions. *Burger v. Burger*, 111 N. Y. 523; *Matter of Rogers*, 10 App. Div. 593, 42 N. Y. Supp. 133.

An appeal brings up for review only the questions raised by exceptions. A general exception to the decree and to each and every part thereof is insufficient. *Angevine v. Jackson*, 103 N. Y. 470; *Ward v. Craig*, 87 id. 550; *Hepburn v. Montgomery*, 97 id. 617.

¶ 167 When Case With Exceptions and Findings Should be Made.

A case must be served within thirty days after service of a copy of the decree and notice of the entry thereof. Rules of Civil Practice, 229 et seq.

In cases tried by the surrogate and a jury the general rules and procedure in such cases apply.

Where a trial is had before the surrogate without a jury, sections 71 and 72 Surrogate Court Act apply as to making a case and exceptions.

It must be borne in mind that not every hearing before the surrogate is a "trial" and therefore, in many appeals it is not necessary or proper to make a case and exceptions. In hearings which are had upon affidavits and other documents, or proof made of certain facts by witnesses, the determination of the court is made in an order, and in no ordinary sense is a trial had. *Matter of Sprathoff*, 50 Misc. Rep. 109.

¶ 168 Exceptions, Case, and Amendments. See ¶ 15.

By section 72, Sur. Ct. A., the provisions of law relating to the manner and effect of taking an exception and the settlement of a case containing the exceptions in other courts, apply to a trial before a surrogate.

The surrogate after a trial by him without a jury is not

obliged to make or pass upon findings, section 71 Sur. Ct. A., but where the matter is referred for trial the referee should proceed in the usual manner and make findings where necessary as provided in section 471, Civ. Pr. Act. *Matter of Troughton*, 101 Misc. Rep. 386, 166 N. Y. Supp. 1077.

The Rules of Civil Practice 229 et seq., contain much that was formerly in the Code of Civil Procedure on the subject of making and serving a case.

An extension of time may be granted by the court on two days' notice in which to serve a case on appeal. Rule 233. *Matter of Williams*, 6 Misc. Rep. 512, 27 N. Y. Supp. 433.

It is the duty of the party appealing to procure to be made such findings or refusals as will present, through appropriate exceptions, the questions which he desires to argue. *Hood v. Hood*, 5 Dem. 50.

Where questions as to the admissibility of evidence are to be raised, in order that the appellate court may determine whether the exceptant was necessarily prejudiced by the admission or rejection of such evidence (§ 72), the case should contain substantially the whole evidence upon that branch of the case. *Matter of Goldsticker*, 54 Misc. Rep. 175, 105 N. Y. Supp. 931.

A case is not settled until signed, and at any time before that occurs either party may request findings and rulings. *Matter of McCarty*, 68 Misc. Rep. 283, 125 N. Y. Supp. 160.

It is the duty of the referee to settle the case and exceptions, and he has no power to go beyond what actually took place before himself and superadd new findings or pass upon proposed additional findings after the decision or decree of the surrogate. *Matter of Nestell*, 72 Misc. Rep. 331, 131 N. Y. Supp. 193; aff'd, 146 App. Div. 940, 131 N. Y. Supp. 1131.

Appeal from settlement of order.

The appellate court will not interfere with the settlement of an order appealed from unless it clearly appears that some paper actually has been omitted from the recital, or that some

paper not used has been included therein. *Matter of Richardson*, 120 App. Div. 406, 105 N. Y. Supp. 615.

Appeal; findings.

Omission of finding of an undisputed fact may be supplied by the appellate court. *Matter of Murphy*, 121 App. Div. 426, 106 N. Y. Supp. 183.

Appeal; evidence.

A case upon appeal in a probate proceeding should contain all the material evidence upon the questions raised. The surrogate should not be asked to certify that his rulings upon admission of evidence did not prejudice the appellant. *Matter of Goldsticker's Will*, 54 Misc. Rep. 135, 105 N. Y. Supp. 931.

¶ 169 Security Required to Perfect Appeal and to Stay Execution.

Security to perfect appeal.

To render a notice of appeal effectual for any purpose, except in a case specified in the next section, or where it is specially prescribed by law, that security is not necessary to perfect the appeal, the appellant must give a written undertaking, with at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him upon the appeal, not exceeding two hundred and fifty dollars.

§ 298, *Sur. Ct. A.* Former § 2759, *Code Civ. Pro.*

Upon filing the undertaking the proceeding is removed to the Supreme Court, and proceedings predicated upon the sufficiency of the undertaking must be taken in the appellate court. *Du Bois v. Brown*, 1 Dem. 317.

Perfecting appeal; leave to file undertaking.

The Surrogate's Court has no power to allow the appellant to file an undertaking *nunc pro tunc* where an appeal has been taken to another court. *In re Gourand*, 172 N. Y. Supp. 816.

An application under this section made after an appeal has been taken should be made to the appellate court. *Matter of Graham*, 172 N. Y. Supp. 606.

Dispensing with undertaking on appeal.

The Surrogate's Court has no power to dispense with an undertaking to perfect an appeal. *Matter of Graham*, 172 N. Y. Supp. 606.

Effect of the undertaking. See ¶ 172.

The surrogate has discretion to allow the giving of the undertaking after the time to do so has expired. § 297, Sur. Ct. A.; *Matter of Witmark*, 15 N. Y. St. Repr. 745.

Justification of sureties; application for new surety or new bond.

By section 151, Civ. Pr. A., the provisions to obtain justification of sureties seems now to apply to all special proceedings, and to provide means of obtaining justification of sureties on appeal from Surrogate's Court which did not exist under the former practice. See also, section 634, Civ. Pr. A. The Surrogates' Court Act makes no provision for justification of sureties particularly applicable to that court, and therefore, the Civil Practice Act which in terms refers to security given in proceedings must furnish the needed procedure. See also Rule 17, New York County.

Effect of appeal on part decree not appealed from.

The right to enforce a part of a decree not appealed from is not affected by the appeal. *Matter of Witmark*, 15 N. Y. St. Repr. 745.

Idem; where decree is for money or delivery of property, etc.

In every case except one in which the letters of an executor, administrator or guardian have been revoked, or a trustee has been removed a notice of appeal by an executor, administrator, testamentary trustee, guardian or other person appointed by the surrogate's court, from a decree, directing him to pay or distribute money, or to deposit money in a bank or trust company, or to deliver property; or by an executor or administrator from an order granting leave to issue an execution against him, does not stay the execution of the decree appealed from unless the appellant gives an undertaking, with at least two sureties, in a sum therein specified, to the effect that if the decree or order, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay all costs and damages, which may be awarded against him upon the appeal, and will pay the sum so directed to be paid or collected, or, as the case requires will

deposit or distribute the money, or deliver the property, so directed to be deposited, distributed, or delivered, or the part thereof as to which the decree or order is affirmed. § 299, *Sur. Ct. A. Former § 2760, Code Civ. Pro.*

Where appellant fails to give the undertaking provided for in this section, the appeal does not furnish a reason for not paying legacies directed to be paid. *Matter of Holmes*, 79 App. Div. 267, 79 N. Y. Supp. 687; aff'd, 176 N. Y. 604.

The undertaking mentioned in this section does not stay the execution of a decree appealed from, except in the cases mentioned, unless the appeal has been perfected by giving the bond under section 298, *Sur. Ct. A. Matter of Witmark*, 15 N. Y. St. Repr. 745.

Security to stay proceedings in case of commitment.

An appeal from a decree or an order, directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court, or an attorney or counsel employed therein, for disobedience to a direction of the surrogate, or for neglect of duty; or directing the commitment of a person refusing to obey a subpoena, or to testify, when required according to law; does not stay the execution of the decree or order appealed from, unless the appellant gives an undertaking with at least, two sureties, in a sum therein specified, to the effect that if the decree or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will, within twenty days after the affirmance or dismissal, surrender himself in obedience to the decree or order, to the custody of the sheriff of the county, wherein he was directed to be committed.

§ 300, *Sur. Ct. A. Former § 2761, Code Civ. Pro.*

An undertaking under this section stays execution after affirmance in Supreme Court, where an appeal is duly taken to the Court of Appeals. *Matter of Pye*, 21 App. Div. 266, 47 N. Y. Supp. 689.

An appeal from an order framing the issues in a probate proceeding does not operate to stay the trial. The order does not affect a substantial right of any of the parties and is not appealable. *Matter of Walsh*, 107 Mis. Rep. 475, 176 N. Y. Supp. 701.

¶ 170 Requisites of Undertaking; Action Thereon. Deposit in Lieu of undertaking; Filing.

Amount and requisites of undertaking; action thereon.

The sum specified in an undertaking, executed as prescribed in either of the last two sections, must be fixed by the surrogate, or by a judge of the appellate court, who may require proof, by affidavit, of the value of any property, or of such other facts as he deems proper.

An undertaking, given as prescribed in the last three sections, must be to the people of the state; must contain the name and residence of each of the sureties thereto; must be approved by the surrogate or a judge of the appellate court; and must be filed in the surrogate's office. The surrogate may, at any time in his discretion, make an order authorizing any person aggrieved to bring an action upon the undertaking, in his own name, or in the name of the people. Such action may be prosecuted in the same manner, and with the same effect as an action upon an administrator's bond; and the proceeds of the action must be paid or distributed as directed by the surrogate, to or among the persons aggrieved, to the extent of the pecuniary injuries sustained by them, and the balance, if any, must be paid into the surrogate's court.

§ 301, *Sur. Ct. A.* Former § 2762, *Code Civ. Pro.*

Unless the appeal is by a representative no undertaking can be required except the one under section 298, *Sur. Ct. A.*, and the giving of that undertaking on an appeal by a legatee from a decree of judicial settlement operates as a stay, under the terms of section 387, *Sur. Ct. A.* *Matter of Arkenburgh*, 11 App. Div. 44, 43 N. Y. Supp. 1150; *aff'g*, 17 Misc. Rep. 543, 41 N. Y. Supp. 287.

Deposit in lieu of undertaking.

Where the appellant is required, by this article, to give an undertaking, he may, in lieu thereof, deposit with the clerk, with whom the decree or order appealed from, is entered, a sum of money, equal to the amount, for which the undertaking is required to be given. The deposit has the same effect, as filing the undertaking; and notice that it has been made, has the same effect, as notice of the filing and service of a copy of the undertaking. The court, wherein the appeal is pending, may direct the mode, in which the money shall be kept and disposed of, during the pendency, or after the determination of the appeal.

§ 303, *Sur. Ct. A.* Former § 1306, *Code Civ. Pro.*

Undertaking must be filed.

An undertaking, given as prescribed in this article, must be filed with the clerk with whom the decree or order appealed from is entered, except that upon

an appeal to the court of appeals the undertaking must be filed with the clerk of the court wherein the original judgment or order was entered.

§ 304, *Sur. Ct. A.* Former § 1307, *Code Civ. Pro.*

Security may be waived.

An undertaking, which the appellant is required, by this article, to give, or any other act which he is so required to do, for the security of the respondent, may be waived by the written consent of the respondent.

§ 302, *Sur. Ct. A.* Former § 1305, *Code Civ. Pro.*

New undertaking to be given when sureties are insolvent, etc.

The court in which the appeal is pending, upon satisfactory proof, by affidavit, that since the execution of an undertaking, given as prescribed in this article, one or more of the sureties therein have become insolvent; or that his or their circumstances have become so precarious, that there is reason to apprehend, that the undertaking is not sufficient for the security of the respondent; may make an order, requiring the appellant to file a new undertaking, and to serve a copy thereof, as required with respect to the original undertaking. If the appellant fails so to do, within twenty days after the service of a copy of the order, or such further time as the court allows, the appeal must be dismissed, or the order or judgment, from which the appeal is taken, must be executed, as if the original undertaking had not been given.

§ 305, *Sur. Ct. A.* Former § 1308, *Code Civ. Pro.*

¶ 171 Power of Appellate Court; Further Testimony.

Where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact, which the surrogate had; and it may, in its discretion, receive further testimony or documentary evidence, and appoint a referee.

The appellate court may reverse, affirm, or modify, the decree or order appealed from, and each intermediate order, specified in the notice of appeal, which it is authorized by law to review, and as to any or all of the parties; and it may, if necessary or proper, grant a new trial or hearing. Upon an appeal from a determination of the surrogate, made upon an application pursuant to subdivision six of section 20 the appellate court has the same power as the surrogate, and his determination must be reviewed as if an original application were made to that court. The decree or order appealed from may be enforced, or restitution may be awarded, as the case requires, as prescribed, with respect to an appeal from a judgment.

§ 309, *Sur. Ct. A.* Former § 2763, *Code Civ. Pro.*

The provision that the appellate court may decide the questions of fact is not inconsistent with the provisions granting appeal. *Matter of Leland*, 219 N. Y. 287.

The appellate court may order a new trial before a jury although by not demanding a jury all parties have waived the

right. *Matter of Allaway*, 187 App. Div. 87, 175 N. Y. Supp. 70.

Power of appellate court as to control of proceeding.

Under these provisions, a proceeding for the probate of a will, by an appeal from the decree in such proceeding, is removed into the Appellate Division. The decree covers the whole question, whether a will shall be admitted to probate. There can be no separation of the matter, leaving a part in the Surrogate's Court. The Appellate Division is given power to deal with the whole matter, even to granting a new hearing. The Surrogate's Court cannot interfere and assume to act at all in the matter of the probate while it is in the Appellate Division, because the latter court has all the power of the Surrogate's Court, and when its work is finished and it remits its action and decision to the Surrogate's Court, the latter court must make the decree or order directed by the Appellate Division and that decree or order settles the whole matter. Nothing the surrogate might do, while the matter was before the Appellate Division, could interfere with the decree directed by the Appellate Division to be entered. The only proper construction of these provisions of the Act, therefore, is, that while the matter of probate is in the Appellate Division and until its work is finished and the matter is finally remitted to the Surrogate's Court, exclusive jurisdiction of the question is in the Appellate Division, and the Surrogate's Court has no authority in the premises. This was the construction given to these provisions by the General Term, First Department, in *Matter of Patterson* (63 Hun, 529-531) and seems to be the only construction permissible. *Matter of Murphy*, 79 App. Div. 541, 81 N. Y. Supp. 101.

Power of appellate court as to taking new testimony and deciding questions of fact.

The appellate court has the same power to decide questions of fact which the surrogate had. Its duty is not limited to the question whether there was sufficient evidence to support

the decision of the surrogate, but it should determine for itself whether the surrogate correctly determined the facts. *Matter of Warner*, 53 App. Div. 565, 65 N. Y. Supp. 1022; *Matter of Rogers*, 10 App. Div. 593, 42 N. Y. Supp. 133; *Kingsland v. Murray*, 133 N. Y. 170; aff'g, 60 Hun, 116; *Matter of Laudy*, 148 N. Y. 403; modg. 78 Hun, 479, 29 N. Y. Supp. 136.

The Appellate Division, by virtue of its power to review the facts, is entitled to take a different view of the weight which ought to be given to the evidence, and its conclusion in that respect cannot be questioned by the Court of Appeals. *In re McMillan* (Piffard v. Adenaw), 218 N. Y. 64.

A probate proceeding by such appeal is removed into the Supreme Court. The Supreme Court becomes a court of original jurisdiction, and has the same power to decide questions of fact which the surrogate had, and may, in its discretion, receive further or documentary evidence and appoint a referee. § 309. The Supreme Court may reverse, affirm, or modify the decree or order appealed from, and each intermediate order specified in the notice of appeal, which it is authorized by law to review as to any or all of the parties, and it may, if necessary or proper, grant a new trial or hearing. It is thus apparent that when once an appeal of this kind is taken the whole proceeding becomes a proceeding in the Supreme Court, and remains in such court until formally remitted back to the surrogate; and until it is so remitted the orders and decrees in the proceeding must be orders and decrees of the Supreme Court. *Matter of Patterson*, 63 Hun, 529, 18 N. Y. Supp. 499.

An order directing an accounting under section 254 rests in the discretion of the surrogate, and the Appellate Division cannot interfere with the exercise of that discretion except in cases where it is abused. *Matter of Blum*, 83 App. Div. 161, 82 N. Y. Supp. 491.

The appellate court may in a proper case refer a question of fact to a referee and suspend decision on the appeal until

the coming in of the report. *Matter of Burr*, 116 App. Div. 518, 101 N. Y. Supp. 776

Appellate Division supplied finding of facts as to value of medical services. *Matter of Snedeker*, 95 App. Div. 149, 88 N. Y. Supp. 847.

The Court of Appeals cannot review the decision of the Appellate Division upon a question of fact, but can do so when only a question of law is involved. *Matter of Totten*, 179 N. Y. 112; revg. 89 App. Div. 368; which revd. 38 Misc. Rep. 349, 77 N. Y. Supp. 928; *Matter of Budlong*, 126 N. Y. 423; aff'g, 54 Hun, 131.

Where upon appeal from surrogate decree settling the accounts of executors the account is not reopened but is sent back to be adjusted as to certain items, the decree is conclusive as to all of the questions passed upon and not so referred back for re-examination or correction, and they may not be litigated upon the second hearing. *Adair v. Brimmer*, 95 N. Y. 35.

The Appellate Division can affirm a judgment favorable to parties who ought to have been made parties to the appeal but have not been so made, but could not reverse. *Lowenhaupt v. Stanisics*, 95 App. Div. 171, 88 N. Y. Supp. 537.

Power to protect infants not appealing.

“ We consider that the Supreme Court has absolute power, subject only to review by the Court of Appeals, to protect the person and estate of infants and other incompetents, and that upon appeal to this court an abuse of discretion exercised by any inferior court to the detriment of such infant may be corrected. The Supreme Court of the State of New York has the inherent power requisite to protect the property and estates of its wards, and so even against the decree of an inferior court which tends to jeopardize or destroy the interest of such ward. We think no citation of authority is necessary to support the proposition that if it comes to the knowledge of the Supreme Court by appeal by a trustee that the estate of an in-

fant or other incompetent person in his hands is about to be plundered, whether under and by virtue of a decree of a Surrogate's Court or otherwise, the Supreme Court has the power to prevent the consummation of such wrong. Yet we think that where the decree made by the Surrogate's Court involves an abuse of discretion, we have ample power to vacate and set aside the same. *In Matter of Selleck* (111 N. Y. 284, 290), Judge Gray said: 'I think, however, that we may properly hold that the exercise of discretion by the surrogate is somewhat qualified by the words in section 2557 (now § 276) "as justice requires," and that the presence of these words would authorize the interposition of an appellate court, where there had been an abuse of discretion and a violation of justice. Broad as the language of the section is, I think the Legislature should not be deemed to have intended that there should be no redress in cases of an abuse of discretion by the surrogate, and that that view finds support in the words quoted.' " *Matter of Stevens*, 114 App. Div. 607; aff'd, 188 N. Y. 589; reported below, 46 Misc. Rep. 623, 96 N. Y. Supp. 297.

Dismissal of appeal.

The special term cannot dismiss the appeal where the trial has been sent to the trial term. The Appellate Division has the sole authority to control the proceeding. *Matter of Miller*, 141 App. Div. 349, 126 N. Y. Supp. 690.

Appeal; proceedings thereupon.

In the appellate division of the supreme court the order made upon an appeal from a decree or an order of a surrogate's court must be entered with the clerk of the appellate division, and a certified copy thereof annexed to the papers transmitted from the court below upon which the appeal was heard, must be transmitted to the court from which the appeal was taken, and the court below shall enter the judgment or order necessary to carry the determination of the appellate division into effect.

§ 310, *Sur. Ct. A.* Former § 2764, *Code Civ. Pro.*

The order entered must conform strictly to the remittitur. *Zapf v. Carter*, 90 App. Div. 407, 86 N. Y. Supp. 175; *Matter*

of *Protestant E. P. S.*, 86 N. Y. 396; *Isola v. Weber*, 12 App. Div. 267, 42 N. Y. Supp. 615.

Since the change in the law made in 1895 the cases of *Matter of Campbell* (48 Hun, 417) and *Matter of Patterson* (63 id. 529) are no longer applicable. *Matter of Hopkins*, 41 Misc. Rep. 83, 83 N. Y. Supp. 890; aff'd, 93 App. Div. 618, 87 N. Y. Supp. 793.

The papers after a trial in the Supreme Court or the determination of an appeal must be sent back to the surrogate in order that his decree may be entered thereupon. *Matter of Laudy*, 35 App. Div. 542, 55 N. Y. Supp. 99.

Entry of order after appeal.

Where the appellate court modifies a decree without remitting the matter to the Surrogate's Court for action, the proper practice is to enter an order in the Surrogate's Court making the order of the appellate court the order of the Surrogate's Court, and no new decree should be entered. Such an order may contain references to the changed or modified amounts to be paid to distributees. *Matter of Garrabrant*, 178 App. Div. 23, 165 N. Y. Supp. 139.

¶ 172 Enforcing Affirmed or Modified Decree; or Cancelling Reversed Decree; Restitution; Supplying Defects; Action on Undertaking.

Mode of enforcing affirmed or modified judgment.

Where a judgment, from which an appeal has been taken, from one court to another, is wholly or partly affirmed, or is modified, upon the appeal, it must be enforced, by the court in which it was rendered, to the extent permitted by the determination of the appellate court, as if the appeal therefrom had not been taken.

§ 497, *Civ. Pr. A.* Former § 1319, *Code Civ. Pro.*

Enforcing affirmed or modified order.

Where a final order in a special proceeding, from which an appeal has been taken, from one court to another, is wholly or partly affirmed, or is modified, upon the appeal, the appellate court may enforce its order, or may direct the proceedings to be remitted, for that purpose, to the court below, or to the judge who made the order appealed from.

§ 633, *Civ. Pr. A.* Former § 1320, *Code Civ. Pro.*

Mode of canceling docket of reversed or modified judgment.

1. Where a final judgment for a sum of money, or directing the payment of a sum of money, has been reversed, or has been affirmed as to part only of the sum, upon an appeal to the supreme court from an inferior court or an appeal to the appellate division of the supreme court taken as prescribed in this chapter; and an appeal to the court of appeals is not taken and perfected, and the security required to stay execution is not given, within ten days after the entry of the judgment upon the appeal, in the clerk's office where the judgment appealed from is entered, the clerk must make a minute of the reversal of the judgment, or of the amount to which it has been reduced, upon his docket-book, in each place, where the judgment is docketed. A transcript of the docket, as thus corrected, must be furnished by him, and may be filed in any county clerk's office, where the original judgment is docketed, as prescribed by law, with respect to the original docket; and thereupon the county clerk must correct his docket accordingly. The lien of a judgment, the docket of which is not corrected, as prescribed in this subdivision, remains unaffected by the reversal or modification thereof, until the decision of the court of appeals, upon an appeal from the judgment reversing or modifying the same, or the expiration of the time to take such an appeal.

2. Where a final judgment for a sum of money, or directing the payment of a sum of money, has been reversed, or affirmed as to part only of the sum, upon an appeal to the court of appeals, the docket may be corrected, as prescribed in the last subdivision, at any time after the remittitur has been filed in the court below.

§ 498, *Civ. Pr. A.* Former § 1321 and § 1322, *Code Civ. Pro.* combined.

Restitution; when awarded

When a final judgment or order is reversed or modified, upon appeal, the appellate court, or the division or term of the same court to which the appeal is taken, as the case may be, may make or compel restitution of property, or of a right, lost by means of the erroneous judgment or order; but not so as to affect the title of a purchaser in good faith and for value. When property has been sold, the court may compel the value, or the purchase price, to be restored, or deposited to abide the event of the action, as justice requires.

§ 587, *Civ. Pr. A.* Part of former § 1323, *Code Civ. Pro.*

Action upon undertaking; when not to be brought.

An action shall not be maintained upon an undertaking given upon an appeal, taken as prescribed for appeals to the supreme court from inferior courts, to the appellate division of the supreme court and from determinations in special proceedings, until ten days have expired since the service upon the attorney for the appellant, and upon the sureties on such undertaking, of a written notice of the entry of a judgment or order, affirming the judgment or order appealed from, or dismissing the appeal. Such service may be made by mailing such notice in a post-paid wrapper, addressed to said surety or sureties at the last known post-

office address of such surety or sureties. Where an appeal to the court of appeals from the judgment or order is perfected, and security is given thereupon, to stay the execution of the judgment or order appealed from, an action shall not be maintained upon the undertaking given upon the preceding appeal, until after the final determination of the appeal to the court of appeals.

§ 161, *Civ. Pr. A.* Former § 1309, *Code Civ. Pro.*

Defects in proceedings may be supplied.

Where the appellant, seasonably and in good faith, serves the notice of appeal, either upon the clerk or upon the adverse party, or his attorney, but omits, through mistake, inadvertence, or excusable neglect, to serve it upon the other, or to do any other act, necessary to perfect the appeal, or to stay the execution of the decree or order appealed from; the court in or to which the appeal is taken, upon proof, by affidavit, of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, upon such terms as justice requires.

§ 297, *Sur. Ct. A.* Former § 1303, *Code Civ. Pro.*

Under this section the appellate court has full power to permit an applicant to file a new undertaking or to do any other act necessary to perfect an appeal from Surrogate's Court. *Matter of Sheldon*, 117 App. Div. 357, 103 N. Y. Supp. 177. See ¶ 169.

No judge or court can extend the time in which to file a notice of appeal (§ 99 Civil Prac. Act), but when a notice is filed and served, the court may permit the appeal to be perfected.

CHAPTER XXXIV.

Rules of Surrogates' Courts and times and places of holding court.

¶ 174 Rules of Practice in Surrogates' Courts in the State of New York and Stated Terms of Court.

(For yearly changes consult Bender's Lawyers' Diary.)

Albany County.—William A. Glenn, Surrogate; Quentin S. McNeil, Clerk, Albany, New York.

Court every day except Saturdays, holidays and during the month of August.

No special rules.

Allegany County.—B. B. Ackerman, Surrogate, Belmont, N. Y.

Court on Friday of each week at the Surrogate's office in the village of Belmont, N. Y.; on the second Thursday of each month at the law office of Francis B. O'Connor, Wellsville, N. Y.; on the third Thursday of each month at the office of John C. Leggett, Cuba, N. Y.

No special rules.

Broome County.—Benjamin Baker, Surrogate, Binghamton, N. Y.

Court on Mondays and Fridays of each week excepting during month of August.

No special rules.

Bronx County.—George M. S. Schulz, Surrogate; Herbert H. Reilly, Chief Clerk, Bronx, New York City.

Rule I. Papers. Whenever a proceeding is commenced in this Court, the Clerk shall assign a file number thereto and note the same in the margin of the book where the proceeding is indexed. Such file number shall be one in a series of that year, and shall be indorsed on all papers in such proceeding or any other proceeding subsequently commenced relating to the same estate or fund.

Every paper to be filed in the Court shall be indorsed with the title of the proceeding to which it relates, a description of the paper, the names and post-office address of the attorney presenting it, and the file number of the proceeding to which it relates.

No paper on file shall be entrusted to any attorney, party or other person except for proper examination thereof in the Clerk's office.

If any referee appointed by this court shall request the delivery to him of any such paper for use before him, the same shall be delivered to him by a messenger of the court upon his receipt therefor.

Parties and attorneys submitting surety company bonds for filing are required to submit with the original bond a true copy of the same.

Rule II. Service of Process; Proof of. In all proceedings the proofs of service of process, notice of hearing, notices of motion and orders to show cause shall be filed on or before one o'clock of the day preceding the day therein named for the return day thereof.

Rule III. Calendars. A calendar of motions and of matters to be tried by the Court without a jury will be called at 10 o'clock a. m. on Monday and Wednesday of each week, except in the month of August.

A term for the trial of controverted questions of fact with a jury, including contested probates in which a jury trial of such questions has been ordered, shall begin on the first Monday of each month, except the months of July, August and September.

A calendar of such contested matters will be called on said first Monday and on each day thereafter while the Court shall sit for the purpose. Such matters will then be tried in their order unless adjournment is granted upon proof of legal excuse.

Rule IV. Probate. In a proceeding for the probate of a will not lost or destroyed, the will and a copy thereof shall be filed with the petition. The correctness of said copy shall be shown by the affidavit of two persons of full age, who shall have compared the copy with the original will.

When all parties in interest have waived the service of citation all papers in the matter must be filed with the probate clerk at least two days before the day fixed for the taking of proof.

Rule V. Administration. Upon an application for letters of administration, where it appears that an intestate was at the time of death the subject of a foreign power, notice of the application shall be given to the consul representing such foreign power.

Rule VI. Guardianship. A petition for the application by a guardian of an infant's property, or any portion thereof, to the support, maintenance and education of the infant, shall show that an annual accounting has been duly filed or that good cause exists for disregarding the omission.

The petition shall show the terms of any previous order for the application of any portion of the infant's property. And if no previous order has been made that fact shall be stated. When the infant is over fourteen years of age he shall join in, subscribe and verify the petition. When the application is made by a person other than the guardian of the property or a parent of the infant, the consent of such guardian or such parent shall be submitted or the application made on notice to him.

When an infant over fourteen years of age applies for the appointment of a special guardian, or where an infant appears by his general guardian, or where

a lunatic, idiot or habitual drunkard appears by his committee, the general or special guardian or the committee shall show that such general or special guardian or such committee is competent to protect the rights of the infant or incompetent and has no interest adverse to that of the infant or incompetent and is not connected in business with any party to the proceeding or the attorney of such party. It must appear whether or not such general or special guardian or committee is entitled to share in the distribution of the estate or fund in which the infant or incompetent is interested, and if the general or special guardian or committee is in any way interested in the estate or fund, the nature of such interest must be disclosed.

No party to a proceeding will be appointed special guardian of any other party thereto. The petition for the appointment of such special guardian as well as the appearance filed by a general guardian of the infant must in every instance disclose the name, residence and relationship to the infant of the person with whom the infant is residing and whether or not said infant has a parent living. If a parent is living, it must be shown by the affidavit of the parent whether or not such parent has knowledge of and approves such application or appearance. In case the parent has an interest adverse to the infant, the petition on the application for the appointment of such special guardian must be accompanied by the affidavit of the parent, showing in addition to such knowledge aforesaid that such parent has not influenced the infant in the choice of the special guardian.

If the foregoing provisions of this rule are not strictly complied with the Surrogate will, on his own motion, appoint a special guardian for such infant or incompetent, as provided in section 64, Surrogate's Court Act, notwithstanding the application of such infant or the appearance by the general guardian or committee.

Rule VII. Accounting. On an accounting by an executor, testamentary trustee or administrator with the will annexed, a sworn copy of the will shall be filed with the petition and account.

When an account is filed for settlement, the accountant shall file therewith a copy of any statement of a claim which has been presented to him and allowed, and which remains unpaid.

Rule VIII. Before evidence is taken on a contested accounting the accountant shall present to the Court a statement in writing of the items for which no voucher is filed, the items as to which he holds the affirmative, the objections which he concedes to be well taken, and the modifications of the account to which the parties consent, and the objectant shall present to the court a like statement of the objections which he withdraws.

Rule IX. Upon a contested accounting any party interested, or a contesting creditor, shall serve a copy of his objections upon the accounting party, or upon his attorney in case he shall have appeared by attorney, within eight days after the filing of the account in the office of the clerk of the court where the accounting is a compulsory one, and within eight days after the return of the citation where the accounting is a voluntary one, or within such further or other time in either case as shall be allowed by the surrogate. The contest shall be confined to the items or matter so objected to. If it shall appear to the satisfaction of the

Court, by affidavit or petition, that an examination of the accounting party will be necessary to enable the contesting party to interpose his objections, such examination may be ordered by the Court.

Rule X. In a proceeding for a judicial settlement of an account, wherein a special guardian shall be appointed to protect the interests of an infant party, no decree will be entered on default against such infant, but such decree shall be so entered only on the written report of the guardian for such infant to the effect that he has carefully examined the account and finds it correct, and upon two days' notice of the settlement thereof to the guardian.

Rule XI. With every proposed decree on an accounting there must be submitted an affidavit of regularity, setting forth the necessary jurisdictional facts. A copy of the form of the affidavit required will be furnished by the Clerk of the Court.

Rule XII. Trials. When on a contested probate the objections contain a demand for a trial of controverted questions of fact with a jury and when in any other proceeding such trial is demanded, the party making such demand shall pay a jury fee of \$3 at the time of the demand and shall, within two days thereafter, serve on the opposing party or parties, with a two days' notice of settlement, a proposed order which, in addition to directing such trial with a jury, shall also state the questions of fact which he deems controverted and desires tried with a jury. In default of the service of such order any opposing party may within three days after such default serve such proposed order, stating the questions of fact, if any, which he deems controverted and desires tried with a jury with like notice of settlement. If at the time of such demand necessary parties have not been cited, the time for service of such proposed order shall not begin to run until the court shall have obtained jurisdiction of such parties.

Rule XIII. Notice of trial of such controverted questions of fact must be served at least fourteen days before the first day of the term at which the trial is to be had, and a note of issue stating in addition to the usual requirements the date of entry of the order directing the controverted questions of fact to be tried with a jury, must be filed at least twelve days before the first day of such term. Where a party has served a notice of trial and filed a note of issue, for a term at which the matter is not tried, it is not necessary for him to serve a new notice of trial, or file a new note of issue, for a succeeding term; and the matter will remain on the calendar until it is disposed of.

A petition for an order for notice of hearing under section 148 of the Surrogate's Court Act shall in all cases where such notice is required be presented by the proponent within five days after the filing of the objections, and on his failure so to do any contestant may present such petition.

Notices of hearing of objections on contested probates where a jury trial has been demanded, as required by section 148 of the Surrogate's Court Act, shall specify as the day of trial the same date specified in the notice of trial.

Rule XIV. If upon a trial any party shall offer in evidence a paper in his control, without having before trial submitted the same to opposing counsel for inspection, the Court may place the matter at the foot of the calendar or otherwise postpone the trial, in order that all papers intended for use on the trial, except such as may be reasonably reserved for the examination or contradiction of a witness, may be submitted to opposing counsel for inspection.

Rule XV. Reports of Referees. When a referee's report is filed with the testimony said report shall be confirmed as of course, unless exceptions thereto are filed by any party interested within eight days after a written notice of such filing and a copy of such report has been served upon the opposing party; and in case exceptions are filed any party may bring on the hearing of the same on any stated motion day on eight days' notice.

Rule XVI. Orders, Decrees and Settlement Thereof. Two days' notice of the settlement of an order on a litigated motion or of a decree or decision shall be given in writing to all the parties who have appeared by attorney in the proceeding in which such order, decree or decision is to be made, and to any special guardian appointed therein.

When a proposed order, decree or decision is served, with notice of settlement thereof, the party served shall not submit any complete substitute therefor, but may submit proposed amendments thereto, properly referring by page and folio to the papers sought to be amended and containing after each amendment a statement of the grounds therefor.

Rule XVII. Miscellaneous. No petition for the probate of a will or for the grant of letters of administration or of guardianship, or for the appointment of a testamentary trustee, will be entertained during the pendency of a prior proceeding for the same or like relief, respecting the same estate or fund, or the estate or person of the same infant.

Rule XVIII. A respondent who files an answer or objection shall file therewith a notice of appearance.

Rule XIX. Special guardians shall file their reports within eight days from the time of their appointment, except where an answer is filed and an adjournment is had or the time to file the report is extended by order. Where a contest has taken place he shall file an affidavit stating in detail the work done by him and the number of days spent in its performance.

Rule XX. Costs. No costs will be allowed to the petitioner who takes proceedings to compel the filing of an inventory by an executor or administrator, unless such executor or administrator shall have unreasonably delayed to make and file such inventory after having been duly requested to do so by or in behalf of the petitioner.

Whenever a party to a decree shall deem himself entitled to costs, the application will be considered and determined by the Surrogate on two days' notice of adjustment. With said notice shall be served a statement showing the items of costs and disbursements to which the party may deem himself entitled, which disbursements shall be duly verified, both as to their amount and necessity. The disbursements for referee's and stenographer's fees must be sustained by affidavits or detailed proof.

At the same time, and on like notice, the Surrogate will pass upon any application for an additional allowance. Such application must be accompanied by an affidavit setting forth the number of days necessarily occupied in the hearing or trial, in preparing the account for settlement and in the preparation for the trial; the time occupied on each day in the rendition of the services, their nature and extent in detail, including the drawing, entering or executing of the decree. In

case such trial shall have been had before a referee, the time necessarily occupied before him may be shown by his certificate.

Rule XXI. Compromise. Upon application for leave to compromise the petitioner's attorney, if any, shall state the total amount of compensation he has received or is to receive from all sources; the net amount to be received by the petitioner as a result of the settlement; whether or not he has become concerned in the application or its subject matter at the instance of the party with whom the compromise is proposed, and whether or not he has received or is to receive compensation from such party, and the amount thereof, if any.

Notice of the application must be given to the next of kin of the decedent of full age within the State who are entitled to share in the proceeds of the compromise, or the consent of such next of kin must be submitted with the application.

Rule XXII. Transfer Tax Proceedings. A special guardian will be appointed to protect the interests of infants upon the return of the appraiser's notice of time and place of appraisal if it appears that their rights are involved and they are not otherwise adequately represented.

Upon the filing of the appraiser's report in a transfer tax proceeding the petitioner shall submit an order determining the value of the property and the amount of the tax in accordance with the said report; upon the failure of the petitioner so to do within five days after the filing of the report any other party to the proceeding may submit such order upon notice thereof to the petitioner. The Surrogate, upon the presentation of such order, will immediately enter the same. The matter will not appear on the calendar at this stage, nor will the court then consider objections to the report.

A party having objections to the report or the order entered thereupon may within sixty days after the entry of such order file a notice of appeal. Said notice must specify the grounds of objections, be served upon all parties appearing before the appraiser and be filed, with proof of service, in the office of the Clerk of the Court. Thereupon the proceeding will be placed upon the calendar for a motion day not less than eight days after the date of the filing of the notice of appeal, and may be noticed for hearing on at least eight days' notice thereof.

Cattaraugus County.—Albert A. Bird, Surrogate, Cattaraugus, N. Y.

Rule I. All petitions, orders and decrees must be endorsed with the title of the proceeding, and the name and post-office address of the attorney, if any.

Rule II. It shall be the duty of the attorney or attorneys to prepare and present all papers that are to be acted on by the Surrogate, and upon the granting of an order or decree, it shall be the duty of the attorney to draft and submit the same to the Surrogate for his signature.

Rule III. All orders and decrees in contested matters, unless settled by consent, must be noticed for settlement with a copy of the proposed decree or order, at least two days before the presentation of the same.

Rule IV. In proceedings for the probate of a will, not lost or destroyed, the will or a copy of the same, must accompany the petition, and be filed with the Surrogate or the Clerk. If not so filed the petition must state the reason for the

failure to file, and the name and address of the person having possession of the same, if known or can be ascertained.

Rule V. In voluntary proceedings for an accounting, the account must accompany the petition, and must be filed with the Surrogate or the Clerk.

Rule VI. Except where otherwise expressly prescribed by statute, all petitions, answers, objections or other pleadings, shall be in writing and verified, and shall contain a plain and concise statement of the matters constituting the party's claim, objection or defense, and a demand for the decree, order or other relief, to which the party deems himself entitled.

Rule VII. Appearances by or on behalf of a party, not served with a citation, must be made by filing with the Clerk a written notice of appearance signed by the party and duly acknowledged, as required by section 63, Surrogate's Court Act.

Rule VIII. No special guardian of an infant or incompetent person in any proceeding will be appointed on the nomination of a proponent petitioner, or accounting party, or his attorney, nor upon the application of any person having an interest adverse to that of the infant.

Rule IX. Every special guardian shall carefully examine all matters in the proceeding affecting the interest of the infant or incompetent whom he represents, and no decree will be made in any such proceeding until the special guardian shall fully report the result of his investigation. Such report may be in writing or stated orally in open court. No allowance will be made to a special guardian unless such report is made.

Rule X. No allowance will be made for the support or maintenance of an infant under section 194 of the Surrogate's Court Act, unless an annual account for the last preceding year has been filed, or good cause shown why it has not been filed, and that fact must be alleged in the petition. The petition must also show the terms of any previous order in the same estate, or if none has been made, that fact must be stated. Where the application is made by any other person than the guardian of the property, it must be upon at least eight days' notice by service of a citation upon such guardian.

Rule XI. No record or paper on file in the Surrogate's office shall be removed from said office by any person; ample facilities, however, will be provided for the examination and transcribing of records by parties or attorneys.

Rule XII. In all proceedings where citation is issued, full and complete proof of service of such citation, or waivers thereof, must be filed before any action will be taken thereon.

Rule XIII. Every petition for the probate of a will or the appointment of an administrator must contain a statement of the estimated value of the personal estate of the decedent, likewise the value of the real property, in addition to the matters required by section 51 and 139 of the Surrogate's Court Act.

Rule XIV. A party contesting a will must, upon the return day of the citation file a written verified answer containing his objections to such probate.

But one adjournment may be had upon the application of the contestant. Any further adjournments must be by consent of the proponent, evidenced by a written stipulation filed with the Clerk or made in open Court. No further adjournment will be allowed except for legal cause shown by affidavit.

Rule XV. Where a jury trial has been lawfully demanded, the order therefor shall state distinctly and plainly each question of fact to be tried.

Such order must be submitted for settlement at the time of the demand of a trial by jury, or in default thereof, it may be thereafter settled at the instance of any party in the same manner as if it were an order on a contested motion.

Rule XVI. Upon application for letters of administration where it appears that the intestate was at death the subject of a foreign power whose consul is entitled by treaty to the right of administration or intervention, notice of the application shall be given to the consul whose right is concerned.

Rule XVII. In all proceedings for the appraisal of estates and the assessment of the tax thereon under the Taxable Transfer Law, the depositions shall be made in duplicate, upon forms furnished by the Clerk. The value of the real property must be established by affidavits in duplicate of two disinterested persons. The petition and depositions with said affidavits shall be filed with the Clerk of the Surrogate's Court.

Upon the filing of the petition and depositions an order will be made appointing the County Treasurer appraiser in such proceeding, who will give due notice of the time and place of such appraisal as provided by section 230 of the Transfer Tax Law.

Rule XVIII. Where the representative of an estate is required to pay a transfer tax, no decree on the judicial settlement of his accounts discharging him will be signed, except on the production of a receipt for the payment of such tax, sealed and countersigned as provided by section 236 of the Transfer Tax Law.

Rule XIX. In all cases where an administrator or executor applies to the Court for authority to settle or compromise a claim for damages for negligence by which the death of the decedent was caused, such application must be by petition, setting forth the terms of the proposed compromise, the particular reason or reasons why such compromise is proper, and the names and ages of all persons interested in such compromise as next of kin, and whether all are of sound mind. Upon the filing of such petition a citation shall issue to all interested parties, and upon the return day thereof, if any of the parties are infants or persons of unsound mind, the Court will appoint a referee to ascertain and report as to the truth of the allegations contained in the petition. Upon the filing of the referee's report, the Court will make such order as shall appear to be for the interest of the parties concerned.

Cayuga County.—Walter E. Woodin, Surrogate; James F. Rich, Clerk, Auburn, New York.

Court at Auburn, Tuesdays and Fridays, except the last two weeks in August and the month of September, for the return of Citations and the transaction of other business upon notice.

No special rules.

Chautauqua County.—Harley N. Crosby, Surrogate, Falconer, N. Y.

Rule I. In probate proceedings, the will propounded must accompany the petition and be filed with the Surrogate or the Clerk of the Court.

Rule II. In voluntary proceedings for an accounting, the account must accompany the petition and be filed with the Surrogate or the Clerk of the Court.

Rule III. In case of the death of a subject of Italy or of Austria-Hungary, leaving no known heirs, or testamentary executor designated by him, a citation containing notice of application for letters of administration shall be served according to law and the practice in Surrogates' Courts upon the consul or consular agent in this consular district of the above-named country, as the case may be.

The Clerk of this Court and attorneys practicing in it, will see that this rule is observed, in accordance with the treaties made between the government of the United States and the governments of said countries.

Rule IV. In all cases proof of the service of a citation must be filed at least three days before the return day of the citation as follows:

1. If the citation is returnable at Mayville or Dunkirk, it must be filed with the Clerk at Mayville.

2. If returnable at any other place, it must be filed with the Surrogate at Falconer.

In the case of failure to comply with this rule, the matter will not be taken up on the return day of the citation.

Rule V. All petitions and answers in this Court, except as otherwise expressly prescribed by law, shall be in writing and contain a plain and concise statement of the facts constituting the claim, objection or defense, and a demand for the decree, order of other relief to which the party supposes himself to be entitled, which petition or answer is required to be verified, endorsed with the title of the estate and proceeding, and the name and post-office address of the attorney.

Rule VI. Appearance by or on behalf of a party against whom a citation has been issued and not served, must be made by filing with the Clerk a written notice of appearance.

Rule VII. On any accounting a party entitled and desiring to contest the account, shall file specific objections, as provided by Rule V and, except in cases where a preliminary examination of the accounting party is required, shall serve a copy thereof on the attorney for the accounting party, if he has appeared by an attorney, at least two days before the return day of the citation issued therein, where the accounting is had upon the petition of the accounting party, and at least two days before the day set for the hearing upon an accounting in all other cases. The original objections must be filed with the Surrogate before a hearing is had thereon.

Rule VIII. No special guardian to represent the interests of an infant in any proceeding will be appointed on the nomination of a proponent petitioner or accounting party, or his attorney; nor upon the application of any person having an interest adverse to that of the infant. To authorize the appointment of a person as special guardian on the application of an infant or otherwise in a proceeding in this Court, or to entitle any general guardian of such infant to appear for him in such proceeding, it must appear that such person or such general guardian is competent to protect the rights of the infant; that he has no interest

adverse to that of the infant, and is not connected in business with the attorney or counsel of any party to the proceeding adverse to the infant.

Rule IX. All special guardians appointed by the Surrogate to protect the rights of infants and incompetent persons, shall report to the Surrogate in writing. Such report shall contain (1) a detailed statement of such guardian's efforts in the interests of such infant or incompetent person; (2) a clear statement of the conclusions and findings of such guardian in relation to all matters intrusted to him; (3) that he has examined the proof of service of citation and the decree or order proposed to be entered therein, and state his findings in regard to the same; and, in case of an accounting (4) that he has also examined the account and vouchers, and state his findings in regard to the same.

No allowance will be made to a special guardian unless he makes and files the report aforesaid.

Rule X. No allowance will be made for support or maintenance of infants under section 194 unless an annual account for the last preceding year has been filed, and that fact must be alleged in the petition, and all applications under said section must contain a statement of previous orders made in the same estate, and when the application is made by any person other than the guardian of the property, it must be made upon at least eight days' notice by service of citation upon the guardian of the property of said infants.

Rule XI. All motions and requests for costs and allowances in proceedings in Surrogate's Court under sections 278 and 279 of the Surrogate's Court Act, must be accompanied by an itemized bill of costs, verified by the party, or his attorney, unless for good cause the same shall be dispensed with by the Surrogate.

Rule XII. In all cases where an administrator or executor applies to the Court for authority to settle or compromise a claim for negligence, such application shall be by verified petition, setting forth the terms of the proposed compromise, the particular reasons why such compromise is proper, and the names and ages of all parties interested in such compromise, and whether all are of sound mind. Upon the filing of such petition, a citation shall issue to all interested parties, and upon the return thereof, if any of the parties are of unsound mind or infants the Court will appoint a referee to ascertain and report as to the truth of the allegations contained in the petition, with his opinion thereon, as to whether or not the interests of the parties interested will be substantially promoted by the proposed compromise. All interested parties shall have notice of the time and place of the hearing before such referee and may be represented by counsel thereon. Upon the filing of the referee's report, the Court will make such order as shall appear to be for the interests of the parties.

Rule XIII. Where application is made to the Surrogate for allowances to appraisers and no party in interest makes a request as to the amount to be allowed, in ordinary cases the fees of appraisers will be fixed according to the value of personal property appraised as follows:

\$1,000 or less.....	\$2.00 per day.
1,000 to \$1,500.....	2.50 per day.
1,500 to 2,500.....	3.00 per day.
2,500 to 5,000.....	4.00 per day.
5,000 and upwards.....	5.00 per day.

Rule XIV. With every petition for the probate of a will, or for the appointment of an administrator, there must be filed an affidavit, stating as accurately as may be the estimated value of all the decedent's real property, and a like estimate of the decedent's personal property, together with the names, addresses, and relationship to decedent of each of the persons entitled to share in the estate, and the value of the share of each.

Rule XV. Where a representative of an estate is required by law to pay a transfer tax, no petition for a final accounting by such representative will be received or filed in this office, and no decree in any such accounting will be signed, except upon the production of a receipt for the payment of transfer tax, sealed and countersigned as provided by section 236 of the Tax Law.

Exemption from payment of transfer tax must be shown by a copy of an order of exemption.

Chemung County.—Charles B. Swartwood, Surrogate, Elmira, N. Y.

Court every Monday at Elmira, at 10 a. m., except during the month of August and on such dates when Monday falls on a legal holiday, in such case Court will be held on the following day.

No special rules.

Chenango County.—James P. Hill, Surrogate, Norwich, N. Y.

Court Monday of each week except the month of August.
No special rules.

Clinton County.—Victor F. Boire, Surrogate, Plattsburg, N. Y.

Rule I. The regular Court day for the return of citations and the transaction of other Court matters upon notice, shall be Monday of each week.

The Surrogate's Court is open for the ordinary transaction of Court matters from nine o'clock a. m. till five o'clock p. m., except legal holidays and half-holidays.

When a regular Court day falls on a legal holiday, matters returnable on such day will stand adjourned, as of course, until the next secular day.

Rule II. In probate proceedings, the will propounded must accompany the petition and be filed with the Surrogate or Clerk of the Court.

Rule III. In voluntary proceedings for an accounting, the account must accompany the petition, be filed and remain on file.

Rule IV. All petitions, answers and objections in any proceeding in this Court, must be in writing and verified.

Rule V. The moving papers in any proceeding in this Court, must in addition to the ordinary information required, contain the address of all the parties at interest, and representatives or proposed representatives.

No paper filed in this Court shall be removed or taken therefrom.

Rule VI. In case of the death of an alien leaving no testamentary executor designated by him, a citation containing notice of the application for letters of administration, etc., shall be served according to law and the usual practice, upon the consul or consular agent, in this consular district, unless the proposed representative is entitled to a distributive share of the estate of the deceased as his widow, heir, or next of kin.

Rule VII. In all applications for permission to compromise claims or causes of actions, the Court will designate the persons who shall be notified and the length of notice required in each particular case, upon the presentation of the petition.

Columbia County.—John V. Whitbeck, Jr., Surrogate, Hudson, N. Y.

Court on Tuesdays and Fridays, except August, at the Court House, Hudson; on the third Thursday of each month, except August, at the Tracy Memorial Village Hall, Chatham, N. Y., for *ex parte* business.

Rule 1. Cases coming on upon citation or upon adjournments thereafter, and not answered will be once adjourned for one week by operation of this rule and without further order or action; thereafter no further disposition whatever will be made of such cases upon the Court's motion, but such cases may be moved upon two days' notice to or the written consent of all parties who have appeared personally or upon the attorney for those appearing by attorney, or where there are no appearances, upon motion of the petitioner.

Cortland County.—George M. Champlin, Surrogate, Cortland, N. Y.

Court for the return of Citations on Mondays of each week, except August and legal holidays, at Cortland, N. Y., other days by appointment and for *ex parte* business.

No special rules.

Delaware County.—Andrew J. McNaught, Surrogate; E. Augusta Clauson, Clerk.

Court Monday of each week, except August, at Delhi; first Saturday of each month, except August, at Stamford; second Tuesday of each month, except August, at Walton.

No special rules.

Dutchess County.—Daniel J. Gleason, Surrogate, Poughkeepsie, N. Y.

Court Monday of each week, except August, at Poughkeepsie, for the return of Citations and Trials, *ex parte* matters every day except Sundays and holidays each month, except August.

No special rules.

Erie County.—Louis B. Hart, Surrogate, Buffalo, N. Y.

Court every day, except during the month of August.

Rule I. Due proof of the service of a citation must be filed with the Clerk of the Court, not later than nine o'clock of the day on which the citation is returnable, so that the Clerk may certify to the Court that the service is in all respects regular; otherwise, the proceeding will not be heard on that day.

Rule II. All proceedings wherein residents of the city of Buffalo or their attorneys appear will be first called at the opening of the Court, each day. Proceedings wherein residents of other towns or their attorneys appear, thereafter.

Rule III. Appearances by or on behalf of a party against whom citations have been issued and not served must be made by filing with the Clerk a written notice of appearance.

Rule IV. Persons not named in a citation, but who claim to be interested in a proceeding and wish to intervene therein must file a similar notice of appearance together with an affidavit or petition showing in what way they are interested in such proceeding.

Rule V. Except when otherwise expressly prescribed by statute, all petitions, answers, objections and other pleadings shall be in writing and verified, and shall contain a plain and concise statement of the facts constituting the party's claim, objection or defense, and a demand of the order, decree or other relief to which such party considers himself entitled.

Rule VI. No special guardian to represent the interests of an infant in any proceeding shall be appointed on the nomination of a proponent or accounting party, or his attorney.

Rule VII. In probate proceedings the will propounded must accompany the petition and be filed with the Clerk of the Court.

Rule VIII. In any proceeding wherein a special guardian shall appear to protect the interests of an infant party, no decree shall be entered against such infant by default; but such decree shall be entered only upon the written and verified report of such special guardian, to the effect that he has examined the account—where there is one—and also the decree to be entered, and finds the same to be correct.

Rule IX. When a petition for an accounting is presented to the Court by an accounting party, the account to which it relates must be filed therewith. On any accounting a party entitled and desiring to contest the account, shall file specific objections, as provided in Rule V, and serve a copy thereof on the attorney for the accounting party, if he has appeared by an attorney, at least two days before the return day of the citation issued thereon, where the accounting is had upon the petition of the accounting party, and at least two days before the day set for a hearing upon an accounting in all other cases, or within such further, or other time as shall for special reasons be allowed by the Court and the contest of such account shall be confined to the items so objected to.

Rule X. A party contesting a will, must, upon the return day of the citation file a written and verified answer containing his objections to such probate. But one adjournment may be had upon the application of the contestant. Any fur-

ther adjournments must be on consent of the proponent evidenced by a written stipulation filed with the Clerk, or made in open Court. No other adjournment shall be allowed except for legal cause shown by affidavit.

Rule XI. Where a trial by jury has been lawfully demanded, the order therefor shall state distinctly and plainly each question of fact to be tried, and, if the trial is to be had in the Surrogate's Court, the order shall set down the trial for a day therein appointed.

Such order must be submitted for settlement at the time for the demand of a trial by jury, or in default thereof, it may be thereafter settled at the instance of any party in the same manner as if it was an order upon a litigated motion.

Rule XII. Two days' notice of the settlement of an order on a litigated motion or of any decree or decision in writing, should be given to all the parties who have appeared in the proceeding, in which order, decree or decision is to be made and any special guardian appointel therein.

Rule XIII. No paper shall be removed from the files of this office by any person. Ample facilities will be provided for the examination and transcribing of all records by parties or their attorneys.

Essex County.—Harry E. Owen, Surrogate; Albert E. Ryan, Clerk, Port Henry, New York.

Court Mondays of each month, excepting the first Monday, at Port Henry, N. Y.; first Monday of each month at Elizabethtown, N. Y.; other days at Port Henry, by appointment.

No special rules.

Franklin County.—Frederick G. Paddock, Surrogate; M. Erma Scanlon, Clerk, Malone, N. Y.

Court every Monday at Malone, except the month of August; first Wednesday of each month, except August, at 2 p. m. at the Village Clerk's office, Saranac Lake, N. Y.; first Thursday of the months of February, April, June, August, October and December, at 2 p. m., at the office of the Village Clerk, Tupper Lake.

Note.—The Surrogate will not be in attendance at any of the terms appointed to be held at Saranac Lake or Tupper Lake unless notice is filed with the Clerk of the Surrogate's Court on the Saturday previous to said terms that there will be business to be attended to at the said term.

Rule I.—The regular Court day for the return of citations and the transaction of Court matters shall be Monday of each week except during the month of August.

Court will open at nine o'clock a. m. and continue until five o'clock p. m.

Rule II. This Court will be closed during the month of August in each year, and no Surrogate's Court matters will be entertained during that time.

This Court will not be opened for business on legal holidays or half holidays.

When the regular Court day falls upon a legal holiday all matters returnable on that day will stand adjourned as of course until the next secular day.

Rule III. No person other than a regularly admitted attorney at law shall be permitted to practice in this Court.

Rule IV. No paper filed in this Court shall be permitted to be removed or taken therefrom.

Rule V. A petition filed in this Court for the probate of a will must be accompanied by the original will, which will be filed and must remain in this Court until removed according to law.

Rule VI. A petition filed in this Court for the final settlement of the account of an executor or administrator must be accompanied by an account of proceedings and proof of publication for claims.

Rule VII. No special guardian to represent the interests of an infant in any proceeding in this Court will be appointed on the nomination of a proponent or accounting party, or his attorney, or upon the application of any person having an interest adverse to that of the infant, and no allowance for services will be made to a special guardian by the Court unless he has made and filed his report in the proceeding in which he may be appointed.

Rule VIII. Whenever an infant is interested in any proceeding in this Court, a special guardian will be appointed to safeguard his interests unless the general guardian of such infant appears in person, and it appears that he has no interests adverse to those of said minor.

Rule IX. In a contested proceeding for the probate of a will, no costs will be allowed to the contestants in case the will is admitted to probate.

Rule X. All petitions and answers in this Court, except as otherwise prescribed by law, must be in writing, and must be verified.

Rule XI. A party seeking to contest the probate of a will must appear in person or by attorney and file a written answer, duly verified.

Rule XII. In any matter or proceeding in which there is a contest no hearing will be adjourned except upon good cause shown by affidavits filed with the Court, unless all parties consent thereto.

Rule XIII. The Surrogate, on the written certificate of the person appointed under section 192 of the Sur. Ct. A., to examine the inventory and accounts of guardians filed in said Surrogate's office, that a general guardian has omitted to file such inventory or account, or the affidavit required by section 191, or that the interest of the ward requires that the guardian should render a more satisfactory inventory or account, will make an order requiring the guardian to supply the deficiency. Whenever it shall appear by the certificate of said person that the guardian has failed to comply with such order within three months after its due service upon him, or that there is reason to believe that sufficient cause exists for the guardian's removal, the Surrogate will appoint a special guardian of the ward for the purpose of filing a petition in his behalf and prosecuting the necessary proceedings for the removal of such guardian.

Rule. XIV. All bonds of administrators and general guardians must conform in all respects to forms prescribed by the Surrogate.

Rule XV. In proceedings for sale of a decedent's real estate instituted under the provisions of the Surrogate's Court Act there must be filed an affidavit of regularity by the attorney before a final decree will be made by the Surrogate.

Rule XIV. The rules governing the procedure in the Supreme Court, so far as they may be applicable, will be adopted as controlling the practice of this Court.

Fulton County.—T. Cuthell Calderwood, Surrogate; Herbert M. Vosburgh, Clerk, Johnstown, N. Y.

The regular Court days for this county are: Monday of each week at the Chambers in the city of Johnstown, N. Y., and Friday of each week at the Chambers in the Masonic building in the city of Gloversville, N. Y., except during the month of August. Citations will be made returnable at 10 o'clock a. m. on such days.

Rule I. Personal appearance by a party must be made by filing with the Court a written notice of appearance, acknowledged or proved, and duly certified.

Rule II. When an attorney or counsellor appears for a party, other than the petitioner, the authority for such appearance shall be in writing and shall be duly filed in the matter or proceeding pending.

Rule III. In applications for the probate of a will, the original will offered for probate must be filed with the petition, if in the possession of the petitioner, or if it can be obtained by him. If not so filed, the petition must state the reason for failing to do so, and the name and address of the person who has the will, if known to petitioner, or if it can be ascertained.

Rule IV. All exemplified copies of foreign wills must be accompanied by a petition and order for recording the same.

Rule V. Rule 27 of the Rules of Civil Practice, forbidding an attorney to become a surety on a bond or undertaking, is applicable to this Court and will be enforced.

Rule VI. All general guardians appointed by the Surrogate's Court will be required to file in the Surrogate's office, in the month of January of each year, an inventory and account as provided by section 190 of the Surrogate's Court Act.

Rule VII. An executor or administrator, who shall have paid any transfer tax, shall without delay file in the Surrogate's office one of the duplicate receipts delivered to him by the County Treasurer, as soon as such receipt has been countersigned by the Comptroller. No decree on final settlement will be made and entered where it appears that the estate is subject to transfer tax and a duplicate receipt so countersigned has not been filed.

Rule VIII. All petitions naming an incompetent must state the name and location of the institution, if any, in which he is confined, and the name and address of his committee, if any.

Rule IX. In proceedings for voluntary accounting by an executor, administrator, trustee, or guardian, the account must be filed with the petition.

Rule X. Upon the application for letters of administration, where it appears that an intestate was at the time of his death the subject of a foreign power, whose consul is entitled by treaty to the right of administration or intervention, notice of the application shall be given to the consul whose right is concerned.

Genesee County.—Newell K. Cone, Surrogate, Batavia, N. Y.

Court every Monday at Batavia, except August; trial terms concurrent with County Court.

No special rules.

Greene County.—Josiah C. Tallmadge, Surrogate, Catskill, N. Y.

Court Monday and Tuesday of each week except August.

No special rules.

Hamilton County.—Timothy D. Sullivan, Surrogate, Long Lake, N. Y.

Court Mondays of each week.

No special rules.

Herkimer County.—Charles Bell, Surrogate, Herkimer, N. Y.

Court Mondays of each week except August.

Rule I. The regular Court day for the return of citations and the transaction of Court matters shall be Monday of each week except during the month of August.

Court will open at 10 o'clock a. m., and continue until 5 o'clock p. m.

When the regular Court day falls on a legal holiday all matters returnable on that day will stand adjourned as of course, until the next secular day.

Rule II. Upon the return day of a citation, issued in any proceeding, should no one appear on the call of the Calendar, the proceeding will be adjourned to the next regular term, and should there be no appearance on such adjourned day, the proceeding will be dismissed.

Rule III. All petitions, orders and decrees must be endorsed with the title of the proceeding, title of the estate and name and post-office address of the attorney.

Rule IV. Except when otherwise expressly prescribed by statute, all petitions, answers, objections and other pleadings shall be in writing and verified, and shall contain a plain and concise statement of the facts constituting the party's claim, objection or defense and a demand of the order, decree or other relief to which such party considers himself entitled.

Rule V. In all proceedings for probate of a will, the original will, if in the possession of the petitioner, or can be obtained by him, must be filed with the petition. If not so filed, the petition must state the reason for failing so to do and the name and address of the person having possession of such will if the same is known or can be ascertained.

Rule VI. In voluntary proceedings for an accounting, the accounting party must file with his petition, his account and the vouchers in support of the same.

Rule VII. All orders and decrees in contested matters, unless settled by consent, must be noticed for settlement before the Surrogate by service of notice of such settlement with copy of proposed decree, at least two days before presentation of the same.

Rule VIII. It shall be the duty of the attorney to prepare and present all papers that are to be acted upon by the Surrogate and upon the granting of an order or decree it shall be the duty of the attorney to draft and submit such orders or decrees to the Surrogate for his signature.

Rule IX. Whenever an infant is interested in any proceeding in this Court, a special guardian will be appointed to safeguard his interests unless the general guardian of such infant appears in person, and it appears that he has no interest adverse to the interest of said minor.

Rule X. All special guardians appointed by the Surrogate to protect the rights of infants and incompetent persons shall thoroughly examine all matters in the proceeding affecting the interest of the infant or incompetent whom he represents and no decree will be made in such proceeding until the special guardian shall fully report in writing, the result of his investigation.

Rule XI. No order will be made permitting a guardian to use any portion of the principal of the estate of his ward, except upon the presentation of a duly verified petition showing fully all the facts making such expenditure necessary. Upon all such applications a copy of the proposed order must accompany the petition.

Rule XII. Directly after any ward arrives at the age of twenty-one years his guardian shall institute proceedings for judicial settlement of his accounts. In all cases where voluntary settlement is made between the guardian and ward the guardian's petition for final discharge accompanied with the acknowledged receipt of the ward must be filed without delay in the office of the Surrogate.

Rule XIII. All representatives of estates are required to take measures for judicial settlement of the same at the earliest practicable date.

Rule XIV. All exemplified copies of foreign wills presented for record must be accompanied by a petition and order for recording the same.

Rule XV. No record or paper shall be removed from the files of this office by any person. Proper facilities will be provided for the examination and transcribing of records and papers by parties and attorneys.

Jefferson County.—Joseph Atwell, Surrogate, Watertown, N. Y.

Court Tuesday of each week at Watertown, N. Y.

No special rules.

Kings County.—George Albert Wingate, Surrogate; John H. McCooey, Chief Clerk, Brooklyn, N. Y.

Rule I. The Surrogate's Court is open for the transaction of business on every secular day as follows: From September 1 to June 30, from 9 a. m. to 4 p. m., except on Saturday; from July 1 to August 31, from 9 a. m. to 2 p. m., except on Saturday; on Saturday, from 9 a. m. to 12 m.

Rule II. Every paper to be used in the Court shall be endorsed with the title of the proceeding to which it relates, a description of the paper and the name and post-office address of the attorney presenting it.

Rule III. Every petition received in the office of the Court, unless an order to the contrary shall be endorsed thereon, shall be forthwith marked with the date of its receipt and placed in a repository suitably labelled and displayed. Until disposed of by the Court such petition shall there remain, open to the inspection of the public, except when removed for proper examination.

Rule IV. No paper in the office of the Court will be intrusted to any attorney, party or other person except for proper examination thereof in the said office.

If any referee appointed by this Court shall request the delivery to him of any such paper for use before him, the same shall be delivered to him upon his execution of a receipt therefor and by a clerk or messenger of the Court.

Rule V. In a proceeding for the probate of a will, not lost or destroyed, a copy of the will shall be filed with the petition, and on or before the return of the citation the original will shall be filed.

Rule VI. Where two or more instruments are offered for probate, citation shall issue to each legatee, devisee, or other beneficiary in being named or indicated in any one of such instruments, if any other of such instruments purporting to have been made after the instrument in which he is so named or indicated contains provisions which might adversely affect his interest.

Rule VII. Upon application for letters of administration, the petition therefor must state whether the intestate was at death a citizen of the United States or a subject of a foreign power, named therein, and where it appears that such intestate was the subject of a foreign power whose consul is entitled by treaty to the right of administration or intervention, notice of the application shall be given to the consul whose right is concerned.

Rule VIII. No petition for the probate of a will, or for the grant of letters of administration or of guardianship will be entertained during the pendency of a prior proceeding for the same or like relief respecting the same estate or the same infant.

Rule IX. On an accounting by an executor, testamentary trustee or administrator with the will annexed, a copy of the will shall be filed with the petition and account.

Rule X. When an account is filed for settlement, the accountant shall file therewith a copy of any statement of a claim which has been presented to him and allowed, and which remains unpaid.

Rule XI. In all proceedings the proofs of service of process shall be filed on or before the day preceding the return, and the proofs of the service of any notice of motion or order to show cause shall be filed on or before the day preceding the day therein named for the hearing of the motion.

Rule XII. A respondent who files an answer or objection shall file therewith a notice of appearance.

Rule XIII. If upon trial any party shall offer in evidence a paper in his control, without having before trial submitted the same to opposing counsel for inspection, the Court will in a proper case place the cause at the foot of the calendar, or otherwise postpone the trial, in order that all papers intended for use on the trial except such as may be reasonably reserved for the examination or contradiction of a witness, may be submitted to opposing counsel for inspection.

If any party shall offer in evidence any paper in his control without having previously submitted the same to opposing counsel for inspection, or if any party shall vexatiously question the authenticity of any paper which has been submitted to his counsel for inspection, the failure so to submit the paper or the making of such question will be regarded by the Court in the adjustment of costs or the consideration of any matter of discretion.

Rule XIV. At the opening of the trial of a proceeding for accounting the accountant shall present to the Court a statement in writing of the items for which no voucher is filed, the items as to which he holds the affirmative, the objections which he concedes to be well taken and the modifications of the account to which the parties consent; and the objectant shall present to the Court a like statement of the objections which he withdraws.

Rule XV. Special guardians shall file their reports within eight days from the time of their appointment, except where an answer is filed and an adjournment is had, or the time to file the report is extended by order. The report or an accompanying affidavit must state in detail the work done and the number of days spent in its performance.

Rule XVI. No allowance will be made to an accountant on the settlement of his account unless there is contained in or appended to his bill of costs a verified statement of the services for which he seeks allowance.

Such statement shall show in detail the number of days upon which services were rendered in preparing the account, the time occupied on each day in such services and the nature of such services.

If the accountant seeks allowance for services to be rendered in drawing, entering or executing the decree, such statement shall show the nature of such services.

Rule XVII. Reports, affidavits and statements showing services for which allowance is asked shall be served upon all parties appearing in the proceeding, and must be filed with proof of such service.

Rule XVIII. Two days' notice of the settlement of any order on a litigated motion or of any decree or decision in writing shall be given to all the parties who have appeared in the proceeding in which such order, decree or decision is to be made and to any special guardian appointed therein.

When a proposed order, decree or decision shall be served, with notice of settlement thereof, the party served shall not submit any complete substitute therefor, but may submit proposed amendments thereto, properly referring by page and folio to the portions of the paper sought to be amended and containing after each amendment a statement of the grounds therefor.

Rule XIX. The Court will sit for the disposition of litigated business during the weeks commencing on the first, second and third Mondays of each month,

except July, August and September, and during the week commencing on the third Monday of September.

Rule XX. A calendar of returns of process and of motions will be called on each secular day of the year except Friday and Saturday.

Upon the call of the calendar on any day not appointed for the disposition of litigated business, all cases in which an issue is joined and all motions which are opposed, except such cases or motions as shall be submitted or specially set down for early hearing by order, shall be adjourned to a day thereafter appointed for the disposition of litigated business.

Rule XXI. A calendar of cases in which orders shall have been made for the trial of any question before the Court and a jury will be called on the first Monday of each month except July, August and September, and on each day thereafter while the Court shall sit for the purpose. Such cases, so far as any question therein shall require trial by jury, will then be tried in their order unless adjournment is granted upon proof of legal excuse.

Rule XXII. A calendar of motions and of cases to be tried by the Court without a jury will be called on the third Monday of September and on the second Monday of each other month except July and August, and on each day thereafter while the Court shall sit for the purpose. Such motions and cases will then be heard unless the Court is occupied with the calendar of jury cases, or adjournment is granted upon proof of legal excuse.

Rule XXIII. An order for a trial by jury in the Surrogate's Court shall set down the trial for a day therein named, and such order, or a further order, shall state distinctly and plainly each question of fact to be tried.

An order to be made in accordance with this rule must be submitted for settlement at the time of the demand for a trial by jury or, in default thereof, may be thereafter settled at the instance of any party in the same manner as if it were an order upon a litigated motion.

Rule XXIV. Principals and sureties upon bonds and undertakings, if natural persons must appear and qualify at the same time before the Administration Clerk. Individual freeholders qualifying as sureties must submit evidences of title. No bond for a sum less than fifty dollars will be approved. No bond given by a surety company, the penalty of which is more than two thousand dollars, will be approved unless it shall be accompanied by the certificate of the surety that the principal has made an agreement with it for the deposit of the moneys and other depositable assets of the estate in the manner declared to be lawful by section 153 of the Civil Practice Act, and that such agreement has provided for such deposit with one or more depositaries previously designated in writing by the Surrogate.

Rule XXV. A petition for the application by a guardian of an infant's property or any portion thereof to the support or education of the infant shall show that an annual accounting has been duly filed or that good cause exists for disregarding the omission.

The petition shall show the terms of any previous order for the application of any portion of the infant's property. The order thereon shall state the period during which the application of the infant's property shall continue, and if an

order for its continuance for more than one year is sought the petition must show the circumstances which justify such order.

When the infant is over fourteen years of age he shall join in, subscribe and verify the petition, and when the petition is made by a person other than the guardian of the property, a copy of the petition, together with two days' notice of the time when it will be presented to the Court, shall be served upon such guardian.

Rule XXVI. Upon application for leave to compromise, the petitioner's attorney, if any, shall state whether or not he has become concerned in the application or its subject matter at the instance of the party with whom the compromise is proposed and whether or not he has received or is to receive compensation from such party.

Rule XXVII. The guardian of an infant's property, if such guardian is a natural person, shall, upon filing the annual account of such infant's property, produce for examination by the Surrogate all securities or evidences of deposit or investment which he has relating to the disposition of such property.

Rule XXVIII. The fees for certificates, certified and exemplified copies, and for recording assignments, releases and foreign wills are regulated by section 29, Surrogate's Court Act.

The payment or acceptance of any other fee or any gratuity by employees for services or affidavits or acknowledgments taken, is prohibited.

Lewis County.—Milton Carter, Surrogate, Lowville, N. Y.

Court every Monday except August.

No special rules.

Livingston County.—Lockwood R. Doty, Surrogate, Geneseo, N. Y.

Court every Monday except August.

No special rules.

Madison County.—Joseph D. Senn, Surrogate, Oneida, N. Y.

Court at Wampsville, Monday of each week; at Cazenovia, first and third Fridays of each month; at Morrisville, on the second Friday of each month and at Hamilton, on the fourth Friday of each month. No Court month of August.

* No special rules.

Monroe County.—Selden S. Brown, Surrogate, Rochester, N. Y.

Court every day except Saturdays and the month of August at Rochester.

Appearances will not be noted unless filed with the Clerk, or indorsed on papers filed.

Special guardians will not be appointed upon the suggestion of counsel.

Cases to be adjourned will be adjourned until 10:30 of the day to which they are respectively adjourned, unless otherwise specially ordered.

Original citations, except as otherwise ordered, will be made returnable at 10 o'clock.

Applications not on the Calendar or stipulated motions and proceedings on uncontested matters will be heard at 10 o'clock.

No applications will be entertained at 2 o'clock when a proceeding is on trial.

There are no sessions of court on Saturday.

In cases of applications for letters of administration or limited letters of administration or for orders authorizing the settlement of actions brought to recover damages for death, or for judicial settlement of executor's or administrator's accounts, in matters of the estates of subjects of the King of Italy, notice of such application must be given to the representative of the Consul of Italy, to wit, the Consular Agent of the Kingdom of Italy, located at Rochester, N. Y., unless he or his attorney appear on said application or waive notice in writing of such application.

Montgomery County.—Fox Sponable, Surrogate, Fort Plain, N. Y.

Court each Monday at 9:30 a. m., except August, at Old Court House, Fonda; when Monday is a legal holiday, Court will be held on Tuesday; Court at room 19, No. 20 Market street, Amsterdam, each Friday at 10:00 a. m., except August, and in case of holiday, the day after.

Rule I. It shall be the duty of the attorney or attorneys to prepare and present all papers that are to be acted upon by the Surrogate; and upon the granting of an order or decree it shall be his or their duty to draft and submit such orders or decrees to the Surrogate for his signature. A proposed order or decree should not be attached to any other paper.

Rule II. All petitions, orders and decrees must be indorsed with the title of the proceedings, title of the estate, and name and post-office address of the attorney.

Rule III. In all probate proceedings, the original will, if in the possession of the petitioner or can be obtained by him, must be filed with the petition. Information must be given to the Clerk as to which, if any, of the subscribing witnesses is dead, and the names of any witnesses that are to be called in behalf of the will, at least one day before the return day of the citation.

Rule IV. When a petition for voluntary accounting is presented, the account to which it relates must be filed therewith.

Rule V. In application for the appointment of guardian of the person and property, or either, of an infant, when there are two or more infants, separate petition and bond must be filed in each case.

Rule VI. All petitions naming infants must state whether they are over or under fourteen years of age.

Rule VII. All petitions naming incompetents must state the name and location of the institution in which confined, and the name and address of the committee, if any.

Rule VIII. No decree or order will be entered in any matter where an infant is interested, without appointing a special guardian, although such infant has a general guardian, unless such general guardian shall file with the Court his appearance for and consent in writing to represent said infant in such matter.

Rule IX. Upon the return day of a citation issued in any proceeding, should no one appear on the call of the calendar, the proceeding will be adjourned to the next regular term, and should there be no appearance on such adjourned day, the proceeding will be dismissed.

Rule X. All exemplified copies of foreign will must be accompanied by a petition and order for recording the same.

Rule XI. No paper shall be removed from the files of this office by any person. Proper facilities will be provided for the examination and transcribing of all papers and records by parties or attorneys.

Nassau County.—Leone D. Howell, Surrogate, Mineola, N. Y.

Rule I. Papers. Every paper to be used in the Court shall be endorsed with the title of the proceeding to which it relates, a description of the paper and the name and post-office address of the attorney presenting it.

Rule II. Service of Process; Proof of. In all proceedings the proofs of service of process, notice of hearing, notices of motion and orders to show cause shall be filed two days before the day named therein for the return thereof.

Rule III. Filing of Objections. In any proceeding if any party interested desires to file an answer or objections, the same must be filed on or before the return day of the citation unless his time to do so is extended by a stipulation of all parties appearing, duly filed, or by the Surrogate on application therefor being made on the return day.

Rule IV. Cases Not Answered. Cases appearing on the calendar and not answered will be marked adjourned for one week; if not answered on the adjourned

day they will be marked "Off Calendar," and can then be restored only upon two days' notice to, or the written consent of, all parties.

Rule V. Administration. Before letters of administration are issued on the estate of any resident alien when it appears from the petition that nonresident aliens are entitled to share in the estate, the consul of the country of which the deceased was a native shall be notified of such application and proof of such notification shall be filed with the proceedings.

Rule VI. Probate. In a proceeding for the probate of a will not lost or destroyed, the will and two copies thereof shall be filed with the petition.

When all parties in interest have waived the service of citation all papers in the matter must be filed with the Clerk at least two days before the day fixed for taking the proof.

Rule VII. Appointment of a General Guardian. Upon the application for the appointment of a general guardian of the person and property, or either, of an infant, where there are two or more infants there must be a separate petition and bond in each matter.

Each application for the appointment of a general guardian must be accompanied by an affidavit, made by some person other than the proposed guardian or a surety on his bond, showing the amount of personal property of the minor, the amount of the yearly rents and profits of his real estate and the yearly income from any other personal property.

Rule VIII. Applications to Expend Money of Minors. A petition for the application by a guardian of an infant's property, or any portion thereof, for the support, maintenance and education of the infant, shall show that an annual accounting has been duly filed or that good cause exists for disregarding the omission.

The petition shall show the terms of any previous order for the applications of any portion of the infant's property; and if no previous order has been made that fact shall be stated. When the infant is over fourteen years of age he shall join in, subscribe and verify the petition. When the application is made by a person other than the guardian of the property or a parent of the infant, the consent of such guardian or parent shall be submitted or the application made on notice to him, and if the infant has parents it shall also show whether or not they are able to support such infant.

Except in exceptional cases, an allowance will be made for the period of one year only, and the order should so provide.

Rule IX. Appointment of Special Guardian. When an infant over fourteen years of age applies for the appointment of a special guardian, or where an infant appears by his general guardian, or where a lunatic, idiot or habitual drunkard appears by his committee, the general or special guardian or the committee shall show by affidavit that such general or special guardian or such committee is competent to protect the rights of the infant or incompetent and has no interest adverse to that of the infant or incompetent and is not connected in business with any party to the proceeding or the attorney or counsel of such party. It must appear whether or not such general or special guardian or committee is entitled to share in the distribution of the estate or fund in which the infant or incompetent is interested, and if the general or special guardian or committee is in any

way interested in the estate or fund, the nature of such interest must be disclosed.

No party to a proceeding will be appointed special guardian of any other party thereto. The petition for the appointment of such special guardian as well as the appearance filed by a general guardian of the infant must in every instance disclose the name, residence and relationship to the infant of the person with whom the infant is residing and whether or not said infant has a parent living. If a parent is living, it must be shown by the affidavit of the parent whether or not such parent has knowledge of and approves such application or appearance. In case the parent has an interest adverse to the infant, the petition on the application for the appointment of such special guardian must be accompanied by the affidavit of the parent, showing in addition to such knowledge aforesaid that such parent has not influenced the infant in the choice of the special guardian.

If the foregoing provisions of this rule are not strictly complied with, the Surrogate will, on his own motion, appoint a special guardian for such infant or incompetent, as provided in section 64, Surrogate's Court Act, notwithstanding the application of such infant or the appearance by the general guardian or committee.

Rule X. Special Guardian's Report. Special guardians shall file their reports within eight days from the time of their appointment except where an answer is filed and an adjournment is had or the time to file the report is extended by the Surrogate.

Rule XI. Accounting. On an accounting by an executor, testamentary trustee or administrator with the will annexed, a sworn copy of the will, together with vouchers, if infants or incompetents are interested, shall be filed with the petition and account. Objections to any account must be in writing, specific and verified.

In any judicial accounting wherein a special guardian shall be appointed, or a general guardian shall appear to protect the interests of an infant or incompetent party to such accounting, no decree shall be entered upon default against such infant or incompetent, but such decree shall be so entered only on the written report of the guardian appearing for such infant or incompetent that he has carefully examined the account and finds it correct.

No decree will be entered on a final accounting unless proof is produced showing that special guardians in previous proceedings have been paid and that the transfer tax on the estate has been paid or that the estate is exempt from taxation.

When nonresident aliens are cited, the consul of the country of which they are subjects shall also be cited.

Rule XII. Payment Into Court. All moneys paid into Court must be paid directly to the County Treasurer to the credit of the matter or proceeding. The Surrogate or Clerk will not receive such moneys.

Rule XIII. Trials by Jury. When on a contested probate, the objections contain a demand for a trial of controverted questions of fact with a jury, and when in any other proceeding, such trial is demanded, the party making such demand shall within two days thereafter, serve on the opposing party or parties, with a two days' notice of settlement, a proposed order which, in addition to directing such trial with a jury, shall also state the questions of fact which he deems controverted and desires tried with a jury. And, in default of the service of such order any opposing party may, within three days after such demand is filed, serve

such proposed order stating the questions of fact, if any, which he deems controverted and desired so tried with a jury with like notice of settlement. A jury fee of \$3.00 shall be paid to the Clerk before the jury is drawn.

Rule XIV. Applications to Compromise Claims. The petition for leave to compromise any claim in favor of an estate, or accompanying affidavits, must set forth the facts from which the Surrogate can determine that the proposed compromise is for the best interests of the estate.

Upon such application, the petitioner's attorney shall state the total amount of compensation he has received, or is to receive from all sources; the net amount to be received by the petitioner as a result of the settlement; whether or not he has become concerned in the application or its subject matter at the instance of the party with whom the compromise is proposed, and whether or not he has received or is to receive compensation from such party and the amount thereof, if any.

Rule XV. Filing Foreign Wills. All exemplified copies of foreign wills presented for record in this office, must be accompanied by a petition praying that the same be recorded, together with decree.

Rule XVI. Transfer Tax Proceedings. In transfer tax proceedings, all petitions for appointment of appraiser must be submitted in duplicate and affidavits and other papers for use by the appraiser in triplicate original. An executor or administrator who shall have paid any transfer tax shall, without delay, file with the Clerk of this Court one of the duplicate receipts.

New York County.—John P. Cohalan and James A. Foley, Surrogates, New York City.

(Adopted February 2, 1915.)

Rule I. Papers. Each petition, decree, order, objection, answer, affidavit, stipulation and other paper submitted to the Court shall be indorsed with the title of the proceeding to which it relates, and a description of the paper and the name and post-office address of the attorney presenting it.

No decree or paper on file in this Court will be intrusted to the attorneys or parties except for the purpose of proper examination in the office where it is deposited, and if any such document or paper shall be needed on a hearing before any referee appointed by this Court the same shall be intrusted to a Clerk or Messenger of this Court and delivered to the referee, who shall execute a receipt therefor.

No paper will be received for consideration by the Surrogate, or for filing in his office, unless it is of the weight prescribed by Rule 10, Civil Practice, or unless it is written or printed in black characters and conforms in all other respects, so far as practicable to the requirements of said rule.

No paper will be received by the Clerk of the Court after argument or submission of a matter subsequent to the date fixed by the Surrogate for the receipt of the same, and no such paper shall be received unless a copy has been served upon the attorney or attorneys for the other party or parties who have appeared in the proceeding.

Rule II. Motion Calendar. A motion calendar will be called on Tuesday and Friday of each week at 10:30 o'clock a. m., except that during the month of July

there will be a calendar on Tuesdays only, and from the last Tuesday in July until the first Tuesday after the 15th of September there will be no calendar.

Rule III. When Motion or Proceeding May be Entered on Calendar; Adjournment of Motion. To entitle a motion or proceeding to be placed upon the motion calendar proof of service of all orders, citations and other papers on which the motion or application is made shall be furnished to the Clerk of the Court at or before one o'clock on the day preceding the motion day. Except where a written stipulation of all the parties to the proceeding has been filed with the Clerk of the Court, a motion shall be adjourned only upon the return day thereof, upon showing legal grounds therefor to the satisfaction of the Surrogate.

Proceedings or motions which have been marked "reserved generally" may be restored to the calendar upon two days' notice to all parties who have appeared in the proceeding.

Rule IV. Probate; Will and Copy to be Filed. The will, if not lost or destroyed, shall be filed with the petition for probate, unless, upon good cause shown by affidavit, the Surrogate dispenses therewith, in which case the will must be filed at least two days before the return day of the citation.

In all cases a copy of the will must be filed with the petition. With such copy there must also be filed an affidavit of two adult persons that they have compared the copy with the original will and that the copy is a true and correct one.

Rule V. In probate proceedings when all parties in interest have waived the service of citation, notice of at least two days must be given to the Probate Clerk before the testimony of the subscribing witnesses will be taken.

Rule VI. Contested Probates. A copy of any objections filed to the probate of a last will and testament shall be served upon the proponent or his attorney in case the proponent shall have appeared by attorney.

In a contested probate proceeding notice of trial shall be served and a note of issue filed as prescribed by Civil Practice Rule 150.

In cases of contests in probate proceedings, where a notice of objection filed is required by section 148 of the Surrogate's Court Act and within five days after objections to the probate are filed, the proponent shall present a verified petition for and procure and enter an order directing such notice. If the proponent fails to present such petition and fails to procure and enter such order within five days after objections are filed, any other party to the proceeding may present such petition and order.

Rule VII. Jury Trials of Probate Cases. Within five days after a jury trial is demanded in the objections filed to the probate of a will the party making the demand shall present on two days' notice of settlement to the attorneys of all parties who have appeared by attorney a proposed order directing such trial by jury. Such order shall state plainly and concisely the controverted questions of fact to be tried by jury. If a party demanding a trial by jury fails to serve and present a proposed order as aforesaid, such order may thereafter be presented by any party to the proceedings.

Rule VIII. Accountings. When a petition for a voluntary account is presented the account to which it relates must be filed therewith. Upon an accounting of any executor, administrator c. t. a. or testamentary trustee a copy of the will must be filed with the petition and account.

Where a representative of an estate is required by law to pay a transfer tax, no decree in a final accounting proceeding will be signed except upon the production of a receipt for the payment of transfer tax, sealed and countersigned as provided in section 236 of the Tax Law. Exemption from payment of transfer tax must be shown by a copy of an order of exemption. (Par. added October 20, 1916.)

Rule IX. Contested Accountings. On an accounting by an executor, administrator, guardian or trustee any party interested or a creditor desiring to contest the account shall file specific objections thereto and shall serve a copy thereof on the accounting party or upon his attorney in case he shall have appeared by attorney within eight days after the filing of the account, where the accounting is a compulsory one, and within eight days after the return of the citation or within eight days after the proceeding is marked for decree where the accounting is a voluntary one, or within such further or other time in either case as shall be allowed by the Surrogate. A special guardian in an accounting proceeding shall file his report or objections within eight days after his appointment, unless for cause shown his time to file such report or objections be extended by the Surrogate.

The contest of the account shall be confined to the items or matter objected to.

Rule X. Affidavit of Regularity. With every proposed decree on an accounting there must be submitted an affidavit of regularity setting forth the necessary jurisdictional facts.

Rule XI. Entry of Decrees Against Infants in Accountings. In any proceeding for a judicial settlement of an account, wherein a special guardian shall be appointed or a general guardian shall appear to protect the interests of an infant party to such accounting, no decree shall be entered upon default against such infant, but such decree shall be so entered only on the written report of the guardian appearing for such infant that he has carefully examined the account and finds it correct, and upon two days' notice to the guardian of the settlement thereof.

Rule XII. Administration. Upon an application for letters of administration where it appears that the intestate was at the time of his death the subject of a foreign power, notice of the application shall be given to the consul or consular representative of such foreign power.

Rule XIII. Guardianship. A petition for the application by a guardian for an infant's property, or any portion thereof, to the support, maintenance and education of the infant, shall show the terms of any previous order for the application of any portion of the infant's property.

When the application is made by a person other than the guardian of the property or a parent of the infant, the duly acknowledged consent of such guardian or parent shall be annexed to the petition, or the application must be made on notice to such guardian or parent.

Rule XIV. A respondent who files an answer or objection shall file therewith a notice of appearance.

Rule XV. Appearance of a General Guardian or Committee. Where an infant appears by his general guardian or where a lunatic, idiot or habitual drunkard appears by his committee the general guardian or the committee shall show that

such general guardian or such committee is competent to protect the rights of the infant or incompetent and has no interest adverse to that of the infant or incompetent, and is not connected in business with the attorney or counsel of or any party to the proceeding. It must appear whether or not such general guardian or committee is entitled to share in the distribution of the estate or fund in which the infant or incompetent is interested, and if the general guardian or committee is in any way interested in the estate or fund the nature of such interest must be disclosed. Where a general guardian appears for an infant, the name, residence and relationship to the infant of the person with whom the infant is residing must be disclosed, and also whether or not the infant has a parent living, and if a parent is living, whether or not such parent has knowledge of and approves such appearance, and such knowledge and approval should be shown by the affidavit of such parent. If the infant has no parent living, like knowledge and approval of such appearance by the person with whom the infant resides must be shown in like manner.

If the foregoing provisions of this rule are not strictly complied with, the Surrogate will appoint a special guardian for the infant or incompetent, as provided in section 64, Surrogate's Court Act, notwithstanding the appearance by the general guardian or committee.

Rule XVI. Referee's Report. A referee shall file with his report all the testimony taken and all the papers and exhibits that were before him in the proceeding in which the report is filed.

When a referee's report has been filed said report shall be confirmed as of course unless exceptions thereto be filed by a party interested in the accounting or proceeding within ten days after a written notice of such filing and a copy of such report shall have been served upon the opposing party; and in case exceptions shall be so filed, any party may bring on the hearing of said exceptions on any stated motion day on the same notice that would be required for the hearing of a motion.

Rule XVII. Justification of Sureties to Undertaking on Appeal. The respondent on any appeal from a decree or order of this court may within ten days after the filing of the undertaking required on such appeal serve upon the attorney for the appellant a written notice that he excepts to the sufficiency of the sureties therein; whereupon and within ten days thereafter such sureties, or other sureties in a new undertaking to the same effect, must justify before the Surrogate, or a clerk designated for that purpose, on five days' notice of such justification, to be served upon the respondent's attorney, by each surety appearing in person before said Surrogate or designated clerk and submitting to an examination, under oath, on the part of the appellant, touching his sufficiency. If such sureties shall be found sufficient, said Surrogate or designated clerk will indorse an allowance thereof upon the undertaking or a copy thereof, and a notice of such allowance shall be served upon the attorney for the exceptant; and the effect of any failure to so justify and procure such allowance shall be to avoid the undertaking.

Rule XVIII. Justification of Sureties to Bond of Executor, Administrator, Guardian, Etc. Principals and sureties upon bonds and undertakings, if natural persons, must appear and qualify before the clerk designated for that purpose by

the Surrogate. Whenever a bond with sureties shall be filed by an executor, administrator, guardian or trustee any person interested in the estate may apply to the Surrogate for an order requiring the sureties in said bond to appear before him or a clerk designated for that purpose and submit to an examination under oath as to their sufficiency as such sureties. If it shall appear to the satisfaction of the Surrogate that such examination is necessary he will make an order prescribing the time and place where such examination shall take place, a copy of which order shall be served upon such executor, administrator, guardian or trustee at least five days before the time fixed for such examination. If on such examination the Surrogate shall be satisfied of the sufficiency of such surety he will indorse his approval upon the bond or a copy thereof; and in case such surety on such examination shall not in the opinion of the Surrogate be sufficient the Surrogate will make an order requiring the substitution of new sureties within five days after the service of a copy of said order upon the executor, administrator, guardian or other trustee, or his attorney, if he shall have appeared by attorney on such examination.

Rule XIX. Notice of Settlement of Orders and Decrees in Litigated Motions. Two days' notice of the settlement of an order on a litigated motion or of a decree or decision shall be given in writing to all the parties who have appeared and to any special guardian in the proceeding in which such order, decree or decision is to be made.

Rule XX. Costs and Allowances. Whenever a party to a decree shall deem himself entitled to costs the matter will be considered and determined by the Surrogate on two days' notice of adjustment. With said notice shall be served a statement showing the items of costs and disbursements to which the party may deem himself entitled, which disbursements shall be duly verified both as to their amount and necessity. The disbursements for referee's and stenographer's fees must be sustained by affidavits or detailed proof.

At the same time and on like notice the Surrogate will pass upon any application for an additional allowance. Such application must be accompanied by an affidavit setting forth the number of days necessarily occupied in the hearing or trial, in preparing the account for settlement and in the preparation for the trial, the time occupied on each day in the rendition of the services, their nature and extent in detail, including the services necessarily rendered or to be rendered in the drawing, entering or executing of the decree. In case such trial shall have been had before a referee the time necessarily occupied in such trial before him may be shown by a certificate of such referee.

Rule XXI. No petition for the probate of a will or for the grant of letters of administration or of guardianship will be entertained during the pendency of a prior proceeding for the same or like relief respecting the same estate or fund or the estate or person of the same infant, except where there is unusual delay in prosecuting such proceeding, and then only upon application to the Surrogate, with notice to the prior applicant.

Rule XXII. Compromise. Upon application for leave to compromise it should appear by the affidavit of the petitioner's attorney that he has investigated the subject matter of the compromise or the facts of any alleged cause of action. If the attorney has become concerned in the application or its subject matter at the

instance of the party with whom the compromise is proposed, or at the instance of any representative of such party, that fact must be disclosed.

Rule XXIII. Transfer Tax Proceeding. Upon the filing of the appraiser's report in a transfer tax proceeding the Surrogate will enter the order (upon the submission thereof) determining the value of the property and the amount of tax. The matter will not appear on the calendar at this stage, nor will the Court then consider objections to the report.

A party having objections to the report, or the order entered thereupon, may, within sixty days, file a notice of appeal, which must specify the grounds of objection. Upon filing said notice of appeal with the Clerk of the Court, together with proof of service of said notice upon all parties that appeared before the appraiser, the proceeding will be placed upon the calendar for the next regular motion day without further notice.

Upon the return of the appraiser's notice of time and place of appraisal a special guardian will be appointed to protect the interests of infants if it appears that their rights are involved and they are not otherwise adequately represented.

"In all applications made to the Court to exempt an estate from taxation, without the appointment of an appraiser, the petition must give the residence of each beneficiary or person entitled to a distributive share." (Par. added, 1918.)

Niagara County.—Charles Hickey, Surrogate, Lockport, N. Y.

The Surrogate will attend at his office for the transaction of business every Monday and Saturday forenoon, and as a rule, every other forenoon, except on Wednesdays and legal holidays, and except also during the month of August and when a trial term of the County Court is in session.

The Surrogate will also sit at North Tonawanda every Wednesday forenoon, and at Niagara Falls, every Wednesday, except on legal holidays and during the month of August, and also except when a trial term of the County Court is in session.

Citations and orders will be made returnable on Mondays and Saturdays only, at Lockport, and on Wednesday forenoons at North Tonawanda and Wednesday afternoons at Niagara Falls.

Business not requiring the issue of a citation will be attended to every forenoon.

The office will be open all day every business day, but the Surrogate will be in attendance during the forenoon only.

The clerk can issue citations.

Oneida County.— E. Willard Jones, Surrogate, Holland Patent, N. Y.

Court Mondays at Utica and Tuesdays at Rome, except during the month of August.

No special rules.

Onondaga County.— John W. Sadler, Surrogate; Joseph J. Glass, Clerk, Syracuse, N. Y.

Court every day, except August and holidays, at Syracuse, N. Y.

Rule I. In all proceedings brought in the Surrogate's Court, the rules of the Supreme Court shall be observed so far as practicable.

Rule II. The filing of a note of issue and the service of a notice of trial shall not be required but, in all proceedings wherein a jury trial is demanded, an order must be made and entered as provided in section 68, Sur. Ct. A., directing a trial of the issues raised before the Surrogate and a jury at the next trial term of the Surrogate's Court, and also directing that a copy of such order, with notice of the entry thereof (and in all probate proceedings, the notice specified in section 148, Sur. Ct. A.), be served personally or by mail at least fourteen (14) days before the opening of the term upon all the parties of the proceeding. Proof of due service thereof shall be made and filed with the Clerk at least twelve (12) days before the opening of the term, and the Clerk, in making up the calendar, shall place proceedings thereon in order in which the orders directing a trial by jury are entered. The date of the entry of such order shall be deemed to be the date of issue.

Rule III. All motions to correct the calendar, or to put proceedings over the term, shall be made the first day of each term on the informal call of the calendar at the opening of Court.

Rule IV. The first ten proceedings on the general calendar shall constitute the day calendar for the first day of each term.

Rule V. A day calendar of ten proceedings shall be made up by the Clerk each day at two o'clock p. m. for the succeeding day to consist:

1. Of the undisposed of proceedings on the existing day calendar, in their order.
2. Of other proceedings which shall have been noticed to the Clerk by either party for the succeeding day calendar previous to the hour for making up the same.

These latter proceedings shall be put on the day calendar in the order in which they stand on the general calendar.

Rule VI. No proceeding shall be deemed passed unless so ordered by the Court.

Rule VII. The Court will not hear any contested motions at any jury term, unless such motion relates to a proceeding upon the calendar of such term, and the hearing thereof is necessary to the disposal of the proceeding.

Ontario County.— Harry I. Dunton, Surrogate; John D. Harkness, Clerk, Canandaigua, N. Y.

Court Mondays at Canandaigua, N. Y., first and third Fridays of each month at Geneva, except during August.

No special rules.

Orange County.— Elwood C. Smith, Surrogate, Monroe, N. Y.

Court at Goshen every Monday, at Newburgh every Tuesday, at Monroe by appointment on any other week day.

No special rules.

Orleans County.— Gerald B. Fluhrer, Surrogate; Dencie L. Rogers, Clerk, Albion, New York.

Court each Monday at Albion, except during the month of August.

No special rules.

Oswego County.— Clayton I. Miller, Surrogate; Harry E. Hinman, Clerk, Oswego, New York.

On Monday of each week, except the month of August, Surrogate's office in the city of Oswego, at 10 a. m.; at Pulaski, the second Thursday of each month except August. Whenever one of the above appointed days falls on a holiday the Court will be held the day following.

No special rules.

Otsego County.— Shirley L. Huntington, Surrogate, Oneonta, N. Y.

Court every Monday, except during the month of August, at Oneonta.

No special rules.

Putnam County.— J. Bennett Southard, Surrogate, Cold Springs, N. Y.

Court every Monday, except in August, at Carmel; second and fourth Saturdays, except in August, at Cold Spring, N. Y.

Jury Terms on the second Mondays of the months of January, March, May, July, September and November, at Carmel.

No special rules.

Queens County.—Daniel Noble, Surrogate, Jamaica, N. Y.

Rule I. Business Hours. The Surrogate's office is open for the transaction of business, except on Sundays, Saturdays and holidays, as follows: From September 1 to June 30, from 9 a. m. to 4 p. m.; from July 1 to August 31, from 9 a. m. to 2 p. m.; on Saturdays from 9 a. m. to 12 m.

Rule II. Calendar. The regular calendar will be called at 10 a. m. on Tuesday of each week, except during the months of August and September.

The calendar of cases in which orders shall have been made for the trial of any controverted questions of fact by the Court, with a jury, will be called on the last Tuesday of each month, except July, August and September and on each day thereafter while the Court shall sit for the purpose. Such cases will then be tried in their order unless adjournments be granted upon proof of legal excuse. (Amended February 23, 1915.)

Rule III. Cases Not Answered. Cases appearing on the calendar and not answered will be marked adjourned for one week, if not answered on the adjourned day they will be marked "off calendar" and can then be restored only upon two days' notice to, or the written consent of all parties.

Rule IV. Proof of Service. Proofs of service of citations or orders to show cause in all proceedings must be filed on or before the day next preceding the return day in order to have the cases placed on the calendar.

Rule V. Form of Papers. All petitions, decrees, orders, objections and other papers must be written or printed in black ink and endorsed with the title of the proceeding, indicating the nature of the application, and the name and post-office address of the attorney. A proposed order must not be attached to any other paper.

All petitions, bonds, proposed orders and other papers must be filed and entered in the office before being submitted to the Surrogate.

Rule VI. Appearances. Parties to proceedings may appear personally or by attorney. An attorney appearing for a party cited must file a written notice of appearance, and when appearing for a party not cited he must, in addition to the notice of appearance, file a written authorization from such party, duly executed and acknowledged as a deed to be recorded.

Rule VII. Objections; Trial by Jury. Objections in probate, accounting or other proceedings must be in writing, duly verified, and a copy must be served upon the petitioner, or upon his attorney, in case he has appeared by attorney.

Within five days after a jury trial has been demanded, the party making the demand shall present, on two days' notice of settlement to the attorneys of all parties who have appeared, a proposed order directing such trial, which order shall state the controverted questions of fact to be tried by jury. If a party demanding a trial by jury should fail to serve and present such order, it may be presented by any party to the proceeding. (Amended February 23, 1915.)

Rule VIII. Stipulations for Adjournments. Stipulations must be in writing, signed by all parties who have appeared in the proceeding and filed on or before the day next preceding the date set for hearing.

Rule IX. Probate Proceedings. In probate proceedings the original will and a sworn copy thereof must be filed with the petition, unless upon good cause

shown by affidavit the Surrogate dispenses with the filing of the original will, in which case it must be filed at least two days before the return day of the citation.

Rule X. Foreign Wills. All exemplified copies of foreign wills shall be accompanied by a petition and an order for recording the same.

Rule XI. Letters of Administration. No letters of administration will be issued while another application for letters on the same estate is pending.

Rule XII. Citizens of Foreign Countries. Upon application for letters of administration, where it appears that an intestate was at the time of his death the subject of a foreign power whose consul is entitled by treaty to the right of administration or intervention, notice of the application shall be given to the consul whose right is concerned.

Rule XIII. Contest of Probate of Will. A party seeking to contest the probate of a last will and testament must file with the Clerk of the Court a written and verified answer, containing a concise statement of the grounds of his objection to such probate, and any facts he may allege tending to establish a want of jurisdiction of the Court to hear such probate. In case such jurisdiction shall be denied or the right of any objecting party to appear and contest shall be questioned, the Court will first hear and pass upon the question of jurisdiction, or the status of the contestant, unless, for the convenience of the parties or the Court, it shall be ordered otherwise.

In all cases of contest in probate proceedings, the proponents shall, within five days after objections to the probate are filed, present a verified petition for and procure and enter an order directing notice of the time and place of hearing of such objections to be given, and prescribing the manner of giving such notice, to all persons in being who would take any interest in any property under the provisions of the will, and to the executor or executors, trustee or trustees named therein, if any, who have not appeared in the proceeding, as required by section 147, Sur. Ct. A., and such petition shall contain the names and addresses of such parties, and state whether any, and which of them, are infants or of unsound mind. In case the proponents shall not present such petition and enter such order within the time aforesaid, such petition may be presented and order entered by or on behalf of any party or parties interested in the estate.

Rule XIV. Certain Persons Must Be Made Parties in Probate Proceedings. Whenever a party shall put in issue on probate the validity, construction, or the effect of any disposition of personal property under section 154, Sur. Ct. A., if it shall appear that all persons interested in such construction are not before the Court, the determination of such question shall be suspended until such persons shall be made parties; and the executor named in the will shall not be held to represent the legatees therein for the purpose of such construction.

Rule XV. When Person Not Executor Entitled to Costs. Whenever any person shall appear in support of the will propounded under section 147, Sur. Ct. A., such person shall not thereby become entitled to recover any costs on the probate of said will unless it shall appear to the satisfaction of the Court that the interest of such person was not sufficiently represented and prosecuted by the executor named in the will and his counsel.

Rule XVI. Accounting (Petition). When a petition for a voluntary accounting is presented the account and vouchers to which it relates shall be filed therewith.

Rule XVII. Statement of Unpaid Claims. When an account is filed for settlement, the accountant shall file therewith a copy of any statement of a claim which has been presented to him and allowed, and which remains unpaid.

Rule XVIII. Account (Copy of Will to Accompany). On an accounting by an executor, testamentary trustee, or administrator with the will annexed, a copy of the will shall be filed with the petition and account.

Rule XIX. Appointment of Special Guardian for Infant. In the absence of a petition by an infant over fourteen years of age for the appointment of a special guardian in any proceeding, the Surrogate will appoint a special guardian upon his own motion. No special guardian to represent the interest of an infant in any proceeding will be appointed on the nomination of the petitioner or his attorney, or upon the application of a person having an interest adverse to that of the infant. To authorize the appointment of a person as a special guardian on the application of an infant or otherwise in a proceeding in this Court, or to entitle a general guardian of such infant to appear for him in such proceeding, it must appear that such person, or such general guardian, is competent to protect the right of the infant, and that he has no interest adverse to that of the infant and is not connected in business with the attorney or counsel of any party to the proceeding. Whenever an infant interested in any proceeding in said Surrogate's Court has a general guardian no decree will be entered without appointing a special guardian to represent said infant's interest therein, unless such general guardian shall file his appearance in writing and his affidavit of no adverse interest, with the Clerk of said Surrogate's Court.

Rule XX. Reports of Special Guardians. Special guardians in accounting proceedings shall file their reports within five days from the time of their appointment, except where objections are filed and an adjournment is had, or their time to file report is extended by the Surrogate. The report or an accompanying affidavit must state in detail the work done and the number of days spent in its performance.

Rule XXI. Bill of Costs. No allowance will be made to an accountant on the judicial settlement of his account unless the bill of costs contains a detailed statement of the days employed in connection with the account, showing the time occupied on each day in the rendition of the services, and their nature and extent in detail.

Rule XXII. Notice of Settlement of Decree. In a proceeding where a notice of appearance and demand has been filed, or a special guardian appointed, two days' notice of settlement of decree must be given, unless all parties who have appeared consent to the entry of the decree.

Rule XXII-a. Where a representative of an estate is required by law to pay a transfer tax, no decree judicially settling the account of such representative will be entered in this Court unless there has been filed in the Surrogate's office a receipt for the payment of such tax, sealed and countersigned as provided by section 236 of the Tax Law, or it has been shown that the estate is exempt from taxation. (Added February 16, 1916.)

Rule XXIII. Hearing of Disputed Claim. Where the parties consent that the Surrogate may hear and determine a disputed claim against the estate of a decedent upon the judicial settlement of the account of an executor or administrator, as provided by the Surrogate's Court Act, the attention of the Court must be directed to this fact on filing the petition for accounting in order that the matter may be placed on the appropriate calendar.

Rule XXIV. Amendment of Proposed Decree, Etc. When a proposed order, decree or decision shall be served, with notice of settlement thereof, the party served shall not submit any complete substitute therefor, but may submit proposed amendments thereto, properly referring by page and folio to the portions of the paper sought to be amended and containing after each amendment a statement of the grounds therefor.

Rule XXV. Papers Not to be Removed from Office. No record or paper on file in this Court will be entrusted to the custody of the attorneys or parties, except for the purpose of proper examination, in the office where it is deposited: and if any such document or paper shall be needed before any referee appointed by this Court, the same shall be entrusted to a clerk or messenger of this Court and delivered to the referee, who shall execute a receipt therefor, and for its delivery.

Rule XXVI. Allowance for Support of Infants. No allowance will be made to infants for support or education under section 194, Surrogate's Court Act, unless the petition shows that an annual accounting has been properly filed or good cause is therein shown why it has not been filed. The petition shall show also the terms of any previous order in the same estate, or, if none has been made, that fact shall be stated. Except in exceptional cases, an allowance will be made for the period of one year only, and the order must so provide. Where the infant is over fourteen years of age, he shall join in the petition; and when application is made by any person other than the guardian of the property it shall be made on at least two days' notice to such guardian.

Rule XXVII. Motions for Reargument. All motions for reargument must be submitted on papers, showing clearly that some question decisive of the case, and which was presented by counsel upon the argument, has been overlooked by the Court; or that the decision is inconsistent with some statute, or with a controlling decision to which, through the neglect or inadvertence of counsel, the attention of the Court was not drawn.

Rule XXVIII. Transfer Tax Proceeding. 1. Upon the filing of the appraiser's report in a transfer tax proceeding the Surrogate will immediately enter the order determining the value of the property and the amount of tax. The matter will not appear on the calendar at this stage, nor will the Court then consider objections to the report.

2. A party having objections to the report, or the order thereupon, may, within sixty days, file a notice of appeal. Said notice to be served upon all parties appearing before the appraiser and proof of service must be filed with the Clerk, with the notice of appeal. Thereupon the proceeding will be placed upon the calendar for the next regular calendar day. This notice must specify the grounds of objection.

3. A special guardian will be appointed to protect the interests of infants upon the return of the appraiser's notice, if it appears that their rights are involved and they are not otherwise adequately represented.

4. A proposed order on a motion to exempt an estate from taxation, must be accompanied by a copy thereof.

Rensselaer County.—Chester C. Wager, Surrogate; Lucien Clickner, Clerk, Troy, N. Y.

Court every day, except Saturdays and the month of August.

Rule I. It shall be the duty of the attorney or attorneys to prepare and present all papers that are to be acted upon or signed by the Surrogate.

Rule II. Each citation issued out of this Court, with proof of service, and all waivers of the same, shall be filed with the Clerk at least two days before the return day thereof.

Richmond County.—J. Harry Tiernan, West New Brighton, N. Y.

Rule I. All motions shall be noticed for hearing, and proceedings made returnable at the Borough Hall, St. George, on Saturday at 10:30 a. m. There will be no Surrogate's Court during the month of August.

Rule II. The calendar will be made up by the Clerk and called at 10:30 a. m. Proof of service in any matter before the Surrogate should be returned before the office closes on the day preceding the return of the citation.

Rule III. Upon the return day of a citation issued in any proceeding, should no one appear, the proceeding will be dismissed, or such other disposition made of the matter as may be directed.

Rule IV. Proper forms for the conduct of the business in the Surrogate's Court will be furnished by the Clerk, but the Clerk shall not be permitted to prepare any petitions or account or in any way act as attorney in any matters in the Surrogate's Court.

It shall be the duty of the attorney or the attorneys to properly prepare and present all papers that are to be acted upon by the Surrogate, and upon the granting of an order and decree it shall be the duty of the attorney to draft and submit the same for his signature.

Rule V. All petitions, orders and decrees must be endorsed with the title of the proceeding and the name and post-office address of the attorney.

Rule VI. In a proceeding for the probate of a will, a copy thereof must be filed with the petition for the probate thereof.

Rule VII. A party seeking to contest the probate of a last will and testament must file a notice of appearance and a written and verified answer containing a concise statement of the grounds of his objections to such probate, and any facts he may allege tending to show a want of jurisdiction of the Surrogate's Court to hear such probate. Should a jurisdictional question be raised, or the right of any objecting party to appear and contest be questioned, the Surrogate will first hear and pass upon the question of jurisdiction, or the status

of the contestant, unless for the convenience of the parties or the Court the Surrogate shall order otherwise.

Rule VIII. All exemplified copies of foreign wills must be accompanied by a petition and order for recording the same.

Rule IX. No decree or order will be entered in any matter where an infant or incompetent is interested, without appointing a special guardian, although such infant or incompetent has a general guardian, or committee; unless such guardian or committee shall file with the Court his appearance for and consent in writing to represent said infant or incompetent in such matter, and an affidavit showing that such general guardian or committee has no interest adverse to those of said minor or incompetent.

Rule X. In applications for the appointment of a guardian of the person and property, or either, of an infant, when there are two or more infants, separate petitions and bonds must be filed in each case; and such petition must state whether said infants are over or under the age of fourteen years.

All petitions naming incompetents must state the name and location of the institution in which confined, and the name and address of the committee if any.

Rule XI. In any judicial accounting wherein a special guardian shall be appointed, or a general guardian shall appear to protect the interests of an infant or incompetent party to such accounting, no decree shall be entered upon default against such infant or incompetent, but such decree shall be so entered only on the written report of the guardian appearing for such infant or incompetent, that he has carefully examined the account and finds it correct.

Rule XII. On an accounting by an executor, administrator, guardian or trustee, any person interested as legatee, next of kin, creditor or otherwise, who desires to contest the account must file specific objections thereto in writing, and such objections shall be verified. On an accounting by an executor, or administrator with the will annexed, or testamentary trustee, a copy of the will must accompany the proposed decree.

Rule XIII. An executor or administrator upon the issue of letters, or within five days thereafter, shall file with the Clerk of this Court an affidavit under the Transfer Tax Law, showing the estimated value of the decedent's real and personal property. An executor shall also state in such affidavit, the names and places of residence, and degree of relationship of the legatees and devisees named in the will, the amount of each legacy or distributive share, and the estimated value of any real property therein devised; and an administrator shall also state in such affidavit the names, places of residence and degree of relationship of all the next of kin and heirs at law. An executor or administrator who shall have paid any transfer tax, or taxes, shall, without delay, file with the Clerk of this Court one of the duplicate receipts delivered to him by the State Comptroller.

Rule XIV. Upon the filing of a petition by an executor, administrator, guardian or trustee, for the judicial settlement of his account, the account to which it relates, and the vouchers, must be filed therewith.

Rule XV. All orders and decrees to be entered in litigated motions, unless settled by consent, must be noticed for settlement, and a copy of the proposed order served at least two days before the same shall be presented for settle-

ment, and all decrees to be entered in contested probate or accounting proceedings shall be settled before said Surrogate on at least two days' notice, and the service of a copy of the proposed decree; and no such order or decree shall be signed in the absence of the opposing attorney except upon consent unless proof of admission of such service shall be presented to the Surrogate on such settlement.

Rule XVI. No letters of administration will be issued while another application for letters on the same estate is pending.

Rule XVII. No papers or records shall be removed from the files in this office by any person.

Rule XVIII. The rules governing the procedure in the Supreme Court, as far as they may be applicable, will be adopted as controlling the practice in this Court.

Rockland County.—Mortimer B. Patterson, Surrogate, Nyack, N. Y.

Court every Monday at New City; every Friday at the Chambers of the Supreme Court, in Nyack; and at the chambers of the County Judge, in Haverstraw, on the first and third Thursdays of every month. These appointments are suspended during the last two weeks in July and the month of August.

Rule I. All petitions, orders and decrees must be endorsed with the title of the proceeding, and the name and post-office address of the attorney.

Rule II. It shall be the duty of the attorney or attorneys to properly prepare and present all papers that are to be acted upon by the Surrogate; and upon the granting of an order or decree it shall be the duty of the attorney to draft and submit the same to the Surrogate for his signature.

Rule III. No record or paper shall be removed from the files of this office by any person; but proper facilities will be provided for the examination and transcribing of records and papers by parties and attorneys.

Rule IV. All exemplified copies of foreign wills presented for record in this office, must be accompanied by a petition and order for recording the same.

Rule V. Upon the filing of a petition by an executor, administrator, guardian or trustee for a judicial settlement of his account, the account to which it relates, and the vouchers, must be filed therewith.

Rule VI. In a proceeding for the probate of a will, the original will, if in the possession of the petitioner, or can be obtained by him, or a verified copy thereof, must be filed with the petition for the probate thereof.

Rule VII. A party seeking to contest the probate of a will must file with the Clerk a notice of appearance, together with a verified answer setting forth his grounds of objection to the will.

Rule VIII. On an accounting by an executor, administrator, guardian, or trustee, any person interested as legatee, next of kin, creditor or otherwise,

who desires to contest the account must file specific objections thereto in writing, and such objections shall be duly verified.

Rule IX. On an accounting by an executor, administrator with the will annexed, or testamentary trustee, a copy of the will must accompany the proposed decree.

Rule X. All petitions must state the residence of the persons named therein.

Rule XI. Where an order to publish a citation is asked for, the petition must state whether the estate involved, real and personal, amounts to more or less than five thousand dollars; and if such order is asked for upon the ground that the name or residence of a party is unknown, it must also state that the name or residence or both of that party cannot, after diligent inquiry, be ascertained by the petitioner.

Rule XII. Upon the return day of a citation issued in any proceeding, should no one appear, the proceeding will be adjourned to the next regular term, and should there be no appearance upon the adjourned day, the proceeding will be dismissed, or otherwise disposed of as the circumstance may warrant.

Rule XIII. An infant may appear in any matter or proceeding by his general guardian, and an incompetent person by his committee, and if he does not so appear, a special guardian shall be appointed for him. Where, however, an infant appears by his general guardian, or an incompetent person by his committee, the Surrogate will inquire into the facts, and will appoint a special guardian, if there is any ground to suppose that the general guardian or committee, as the case may be, has any interest adverse to that of his ward, or that for any other reason the interests of the infant or incompetent person require the appointment of a special guardian.

Rule XIV. Special guardians will carefully and thoroughly acquaint themselves with the rights of their wards; and shall also carefully examine all process and papers, to see if they are regular, and have been duly served upon their wards; and no compensation shall be awarded to any such guardian until he shall have made and filed his verified report.

Rule XV. An inventory returned for filing in this office must be accompanied by due proof of the posting and service of notice upon the legatees and next of kin required by section 195 of the Surrogate's Court Act.

Rule XVI. A decree shall not be entered upon the final settlement of the account of an executor or administrator until satisfactory proof is presented that any transfer tax or taxes due from the estate have been paid; or that the estate is exempt from taxation under the Transfer Tax Law.

Rule XVII. An executor or administrator upon the issue of letters, or within five days thereafter, shall file with the Clerk of this Court an affidavit under the Transfer Tax Law, showing the estimated value of the decedent's real and personal property. An executor shall also state in such affidavit, the names and places of residence and degree of relationship of the legatees and devisees named in the will, the amount of each legacy or distributive share, and the estimated value of any real property therein devised; and an administrator shall also state in such affidavit, the names, places of residence and degree of relationship of all the next of kin and heirs at law.

Rule XVIII. An executor or administrator who shall have paid any transfer

tax or taxes, shall without delay file with the Clerk of this Court one of the duplicate receipts delivered to him by the County Treasurer.

Rule XIX. In applications for the appointment of general guardian of the persons and property, or either, of an infant, when there are two or more infants, there must be a separate petition and bond in each case.

Rule XX. All petitions naming an incompetent, must state the name and location of the institution, if any, in which he is confined, and the name and address of his committee, if any.

Rule XXI. All petitions, answers and objections in this Court, except as otherwise provided by law, shall be in writing, and contain a plain, concise statement of the facts constituting the claim, objection or defence, and a demand for the order, decree, or other relief, which the party claims, and they shall be duly verified.

Rule XXII. All petitions filed in this Court shall comply with the provisions of section 51 of the Surrogate's Court Act; and the citations issued thereupon shall comply with the provisions of sections 63 and 64.

Rule XXIII. Whenever a paper or instrument is required to be "acknowledged or proved and certified," the same shall be acknowledged or proven in the same manner as a deed is required to be acknowledged or proved and certified to be recorded in this county, except that when executed within the State of New York, no certificate of the County Clerk shall be required.

Rule XXIV. All moneys or securities directed to be paid or delivered to this Court must be paid or delivered directly to the County Treasurer to the credit of the matter or proceeding in which such direction shall have been made; and the party making such payment or delivery shall at the same time deliver to the County Treasurer a duly certified copy of the order or decree containing such direction. The Surrogate will not in person receive any such moneys or securities.

Rule XXV. The practice of this Court shall be governed by the general rules of practice of the Supreme Court, so far as they are applicable.

(Adopted November 1, 1917.)

St. Lawrence County.—Alric R. Herriman, Surrogate, Ogdensburg, N. Y.

No special rules except that the Will or copy thereof must be filed with the petition for probate.

Regular terms of the Surrogate's Court of St. Lawrence county will be held every month, except August as follows: First Monday at Potsdam, second Monday at Ogdensburg, third Monday at Canton, fourth Monday at Gouverneur, fifth Monday, when occurring, at Ogdensburg.

When any such Monday is a legal holiday, the term will be held on the next following day.

Saratoga County.—William S. Ostrander, Surrogate; George O. Tuck, Clerk, Saratoga Springs, N. Y.

Court first Monday of each month at Ballston Spa; third Monday at Mechanicville; fourth Monday at Waterford; all other times at Saratoga Springs.

Surrogate's vacation in July instead of August.

Rule I. No record or paper on file in this Court will be entrusted to the custody of any person except for the purpose of proper examination in the office where it is deposited, unless such document or paper shall be needed before some other Court or a referee appointed by this Court, in which case the same shall be entrusted to the Clerk of this Court for delivery to such other Court or referee, in accordance with the law, and upon due provisions for its return.

Rule II. No allowance will be made to a party on the judicial settlement of an account unless the bill of costs contains a detailed statement of the days lawfully employed in connection with the accounting and a detailed statement of disbursements.

Rule III. On an accounting by an executor, testamentary trustee or administrator with the will annexed, a copy of the will shall be filed with the petition and account.

Rule IV. At the time when letters testamentary or of administration are issued, an affidavit of the value of the estate shall be filed.

Rule V. No allowance will be made to infants for their support and education unless the petition shows that an annual accounting has been properly filed, or good cause is therein shown why it has not been filed. The petition shall also show the terms of any previous order in the same estate, or, if none has been made, that fact shall be stated, except in unusual cases no allowance will be made for a period exceeding one year. Where the infant is over fourteen years of age he shall join in the petition, and when application is made by any person other than the guardian of the property it shall be made on at least two days' notice to such guardian.

(Adopted July 1, 1916.)

Schenectady County.—Alexander M. Vedder, Surrogate, Schenectady, N. Y.

Court on Monday of each week unless a holiday.

No special rules.

Schoharie County.—Dow Beekman, Surrogate, Middleburg, N. Y.

Court on Monday of each week except in August.

No special rules.

Schuyler County.—George M. Velie, Surrogate; J. B. Everts, Clerk, Watkins, New York.

Court Monday of each week at Watkins, N. Y., except during the month of August.

No special rules.

Seneca County.—George F. Bodine, Surrogate, Waterloo, N. Y.

Court at Waterloo every Monday; at Ovid the third Wednesday of every month.

On and after January 1, 1914, the following rules will be followed in the transaction of business in the Surrogate's Court of Seneca county, and further rules will be adopted from time to time as the necessity therefor is suggested:

Rule I. The Surrogate requests that all motions be noticed for hearing and proceedings made returnable on Tuesday of any week at the Surrogate's office, Waterloo, and on the third Wednesday of any month at the Court House in the village of Ovid, except during the trial terms of County Court. There will be no Surrogate's Court during the month of August.

Rule II. In a proceeding for the probate of a will the original or a copy thereof must be filed with the petition for the probate thereof.

Rule III. Upon the filing of a petition by an executor, administrator, guardian or trustee for the judicial settlement of his account, the account to which it relates and the vouchers must be filed therewith.

Rule IV. No special guardian to represent the interests of an infant in any proceeding in said Surrogate's Court will be appointed on the nomination of a proponent or the accounting party or their attorney. If an infant appear by his general guardian or an incompetent person by his committee the Surrogate will inquire into the facts and will appoint a special guardian if for any reason he believes that the general guardian or committee, as the case may be, has any interest adverse to that of his ward or if for any other reason the interests of the infant or incompetent require the appointment of a special guardian. Allowances to special guardians will be made in each case commensurate with the work done, time consumed and the size of the estate.

Rule V. Upon the application for the appointment of a general guardian of the person and property, or either, of an infant, where there are two or more infants there must be a separate petition and bond in each matter.

Rule VI. All general guardians appointed by the Surrogate's Court will be required to file in the Surrogate's office in the month of January of each year, an inventory and account as provided by section 190 of the Surrogate's Court Act.

Rule VII. Where an order to publish a citation is asked for the petition must state whether the estate involved amounts to more than two thousand dollars. The petition must be accompanied by an affidavit setting forth the facts required by section 51 of the Surrogate's Court Act.

Rule VIII. Costs and allowances on judicial settlements will be made in conformity with sections 278 and 279 of the Surrogate's Court Act, and attor-

neys are requested to include in the final account as filed and as a part thereof their charges for services rendered in preparing the same, so that on the final settlement the allowance will include charges only for services rendered and to be rendered after account has been prepared.

Steuben County.—Edward C. Smith, Surrogate, Addison, N. Y.

Rule I. All papers served or filed must be indorsed with the name of the attorney, or attorneys, or the name of the party if he appears in person, and with his or their office address or place of business.

Rule II. It shall be the duty of the attorney, attorneys or party to properly prepare and present all papers to be acted upon by the Surrogate, and when an order or decree has been granted upon his or their application, it shall be his or their duty to draft and submit such order or decree to the Surrogate for signature and entry.

Rule III. The standing rule of this Court against the removal of papers from the files or records will be enforced, and attention is called to section 2050 of the Penal Laws touching this subject; and when an attorney or party desires an office copy or copies it is suggested that when he makes a draft of an order or decree to be signed that he make a copy of the same and send the same with the decree or order to the Surrogate, and the Surrogate or Clerk will make the same conform to the original thereof and return the same to the attorney or party.

Rule IV. In presenting papers to the Court the attorney or party will attach and securely fasten the papers together so far as practicable.

Rule V. All moneys paid into Court must be paid directly to the County Treasurer to the credit of the matter or proceeding. The Surrogate or Clerk will not receive such moneys.

Rule VI. Special guardians must carefully and thoroughly acquaint themselves with the rights of their wards, also carefully examine all process and papers and see if they are regular and have been duly served upon their wards and that the Court has obtained jurisdiction over the person of the wards.

Rule VII. All bonds, undertakings, satisfactions of decree, consents and waivers must be duly acknowledged and certified by an officer who is authorized to take and certify the acknowledgment of deeds to be recorded in the county of Steuben, and when taken by an officer not authorized to take and certify the acknowledgment of deeds to be recorded within said county, then the certificate of acknowledgment must have attached thereto the certificate of the County Clerk in the same form as where the acknowledgment of a deed has been taken by an officer not authorized to take and certify acknowledgments of deeds within the said county.

See § 58 of the Surrogate's Court Act.

See § 310 of the Real Property Law.

General Construction Law, § 10 and § 11.

Rule VIII. Upon the application for the appointment of a general guardian of the person and property, or either, of an infant, where there are two or more infants there must be a separate petition and bond in each matter.

Rule IX. All petitions and answers presented to this Court or filed therein, except as otherwise expressly prescribed by statute, must be in writing, and must contain a plain and concise statement of the facts constituting the claim, objection or defense, and a demand for the decree, order or relief which the party claims, and the said petition or answer shall be duly subscribed and verified.

Rule X. When an attorney or counsel appears for a party in this Court, if the party is not a resident of the State, the authority for such appearance shall be in writing and shall be duly filed in the matter or proceeding pending.

Rule XI. In a proceeding to probate a will, the proposed will shall be filed with the petition for the probate thereof.

Rule XII. On filing a petition for a voluntary accounting of an executor, administrator, guardian or trustee, the account and vouchers must be filed therewith.

Rule XIII. In a transfer tax proceeding, upon the filing of the appraiser's report, the Surrogate will immediately enter on order determining the value of the property and the amount of the tax, and if a party thereto has any objection to the report of the appraiser, or to the order entered thereon, he may, within the time prescribed by law, file a notice of appeal therefrom and serve said notice upon all the parties appearing before the appraiser, and proof of due service of such notice shall be filed with the Clerk of this Court with the notice of such appeal. The notice of appeal must specify the grounds of objection. A special guardian will be appointed in the matter to protect the interests of infants upon the return of the appraiser's notice, if it shall appear that their rights are involved, and that they are not otherwise adequately represented.

Rule XIV. In every proceeding where a party shall ask for an allowance for services and disbursements, or either, to repay himself for services of his attorney or counsel, or either; and whenever a special guardian shall ask for an allowance for services and expenses in any matter, the affidavit of the party, attorney or special guardian, as the case may be, must be presented to the Surrogate and filed showing the actual services rendered by such attorney, counsel or guardian, and the expenses or disbursements paid or incurred, which affidavit shall state the number of days spent by such attorney, counsel or guardian for which pay may be asked.

Rule XV. In every proceeding for the judicial settlement of the account of an executor or administrator with the will annexed, or a testamentary trustee, there must be filed with the petition and account a true copy of the last will of the testator or testatrix.

Rule XVI. Rule 27 of the Rules of Practice forbidding an attorney to become a surety on a bond or undertaking is applicable to this Court and will be rigidly enforced by the Surrogate.

Rule XVII. In all applications of a party for leave to compromise a claim or claims in favor of an estate against another party, the application shall be made by the petition of the party, and be accompanied by the affidavit of the attorney for such party, which should show that such attorney has carefully and thoroughly investigated the facts and in his opinion the claim should be compromised in accordance with the prayer of the petition.

Suffolk County.—Selah B. Strong, Surrogate, Riverhead, N. Y.

(As amended January 1, 1918.)

Rule I. The Surrogate will hold court at Riverhead on Monday of each week at 1 o'clock p. m.

The Surrogate will also sit at the Town Hall at Huntington on Tuesday of each week (except during the month of August) at 10:30 o'clock a. m., when citations and motions may be made returnable.

The Surrogate will fix such times for the holding of jury terms as may be required and notice thereof will be sent to all attorneys who have appeared in such proceedings.

Rule II. Upon the return day of the citation, issued in any proceeding, should no one appear on the call of the calendar the proceeding will be adjourned one week, and should there be no appearance on such adjourned day the proceeding will be dismissed.

Rule III. All petitions, orders and decrees must be endorsed with the title of the proceeding, title of the estate, and name and post-office address of the attorney.

Rule IV. All petitions must state the relationship to the deceased of all persons named therein, and all petitions naming infants must state whether they are over or under the age of fourteen years, and if under fourteen the name and address of the father, or if the father be dead, the name and address of the mother, together with the name and address of the general guardian, if any, and of the name of the person with whom said infants reside.

Rule V. All petitions naming incompetents must state the name and location of the institution in which confined, and the name and address of the committee, if any.

Rule VI. In all proceedings for the probate of a will the original will, if in the possession of the petitioner, or can be obtained by him, must be filed with the petition, and if the will is not so filed the petition must state the reason for failing so to do, and the name and address of the person having such will. The petition for probate must also recite whether the witnesses are all living.

Rule VII. Proof of personal service of all citations issuing out of this Court (and of all waivers) must be filed with the Clerk at least two days before the return day thereof.

Rule VIII. In accountings the account and vouchers in support thereof must be filed with the petition at least five days before the return day of citation.

Rule IX. It shall be the duty of the attorney to prepare and present all papers that are to be acted upon by the Surrogate, and upon the granting of an order or decree it shall be the duty of the attorney to submit such order or decree to the Surrogate for his signature not later than the next Court day; otherwise the proceeding will be deemed abandoned. No order fixing a tax on a transfer tax proceeding will be signed until the attorney for the estate has had at least two days' notice of settlement.

Rule X. All guardians must in the month of January of each year file the annual inventory and account as required by section 190, Sur. Ct. A. Failure

to file such account will be treated as cause for proceedings for removal of the guardian.

Directly after any ward arrives at the age of twenty-one years his guardian shall institute proceedings for judicial settlement of his accounts. All representatives of estates are required to take measures for judicial settlements of the same at the earliest practicable date.

Rule XI. No order will be made permitting a guardian to use any portion of the principal of the estate of his ward, except upon the presentation of a duly verified petition showing fully all the facts making such expenditure necessary. Upon all such applications a copy of the proposed order must accompany the petition.

Rule XII. No order will be signed permitting an executor or administrator to settle a death accident case unless the petition and order recites and fixes the compensation of attorneys. And no order will be signed permitting the settlement of a death accident case for nominal damages (amount of expenses) until an examination is had before the Surrogate.

Rule XIII. The practice of this Court shall be governed by rules of the Supreme Court so far as rules are applicable.

Sullivan County.—George H. Smith, Surrogate; William H. Holmes, Clerk, Monticello, N. Y.

Court at Monticello every Monday, at 2 p. m., except in the month of August.

No special rules.

Tioga County.—George F. Andrews, Surrogate E. M. Robison, Clerk, Owego, N. Y.

Court each Monday at Court House, Owego.

No special rules.

Tompkins County.—Willard M. Kent, Surrogate, Ithaca, N. Y.

Court at Ithaca every Monday except during August.

Rule I. No paper filed in this Court shall be permitted to be removed or taken therefrom. Proper facilities will be provided for the examination and transcribing of all papers and records by parties or attorneys.

Rule II. All petitions and answers in this Court, except as otherwise prescribed by law, must be in writing and must be verified.

Rule III. All bonds of administrators and general guardians must conform in all respects to forms prescribed by the Surrogate.

Rule IV. In all probate proceedings, the original will, if in possession of the petitioner or can be obtained by him, must be filed with the petition. Information must be given to the Clerk as to which, if any, of the subscribing witnesses is dead, and the names of any witnesses that are to be called in behalf of the will, at least two days before the return day of the citation.

Rule V. Where an order to publish a citation is asked for, the petition must state whether the estate involved amounts to more or less than \$2,000.

Rule VI. All petitions for the probate of a will or for letters of administration must separately state the value of the personal property, and whether or not decedent left any real estate, and if so, the value thereof.

Rule VII. Special guardians will carefully and thoroughly acquaint themselves with the rights of their wards; and shall also carefully examine all processes and papers, to see if they are regular, and have been duly served. And such special guardian shall not be entitled to any compensation until he has made and filed his written report.

Rule VIII. All petitions naming infants must state whether they are over or under fourteen years of age, and if under fourteen, the name and address of the father, or if he be dead, the name and address of the mother, together with the name and address of the general guardian, if any, and the name of the person with whom such infant resides.

Rule IX. In accountings, the account must be filed with the petition, and the petition must show whether or not the estate is taxable under the law relating to taxable transfers, and, if so, that the tax has been paid.

Surrogate's Court is always open for business.

Ulster County.—George F. Kaufman, Surrogate; Daniel B. Deyo, Clerk, Kingston, N. Y.

Court Mondays and Tuesdays of each week, except in the month of August, at Kingston, N. Y.

No special rules.

Warren County.—George S. Raley, Surrogate, Glens Falls, N. Y.

Court held at Glens Falls.

No special rules.

Washington County.—Frederick Fraser, Surrogate; Frank C. Brown, Clerk, Salem, N. Y.

Court at Salem each Monday; at Hudson Falls the second Wednesday of each month, except August.

No special rules.

Wayne County.—Clyde W. Knapp, Surrogate; Caroline E. Austin, Clerk, Lyons, N. Y.

Court each Monday, except August.

No special rules.

Westchester County.—George A. Slater, Surrogate, Portchester, N. Y.

Court held at White Plains.

(In effect January 1, 1920.)

Rule I. Papers. Every paper to be used in the Court must not be folded, and shall be endorsed with the title of the proceeding to which it relates, a description of the paper, and the name and post-office address of the attorney or person presenting same.

No paper on file shall be entrusted to any attorney, party or other person except for proper examination thereof in the Clerk's office.

If any referee appointed by this Court shall request the delivery to him of any such paper for use before him, the same shall be delivered to him by a messenger of the Court upon his receipt therefor.

Rule II. Proofs of Service. In all proceedings, the proofs of service of process, notice of hearing, notices of motion and orders to show cause shall be filed two days before the day therein named for the return day thereof.

Rule III. Calendar. Should proofs of service be not filed as prescribed in Rule II, the motion or proceeding will be placed on the calendar, and such motion or proceeding and all other matters not answered on the calendar call, will be adjourned for one week; if not answered on the adjourned day, such matters will be marked "reserved generally," and may only be restored to the calendar upon two days' notice or upon the written consent of all parties interested therein.

Rule IV. Appearances. Parties to proceedings may appear personally or by attorney. An attorney appearing for a party duly cited must file a written notice of appearance, and, when appearing for a party not cited, he must, in addition to filing a notice of appearance, file a written authorization from such party, duly executed and acknowledged as a deed to be recorded.

Rule V. Objections. Objections in probate, accounting and other proceedings must be in writing and duly verified.

Rule VI. Bonds. When a bond is filed in any proceeding, the minimum amount thereof shall not be less than \$250.

When a personal bond is filed, at least one of the sureties thereto must be a freeholder of the State of New York.

Parties and attorneys submitting surety company bonds for filing are required to submit with the original a true copy of the same.

Rule VII. Probate. The original will must be filed with the petition for its probate, unless, upon good cause shown by affidavit the Surrogate dispenses with the filing thereof, in which event the original will must be filed at least two days before the return day of the citation. With said petition must be filed a copy of said will and an affidavit of two adult persons to the effect that they have compared the copy with the original will and that the same is a true and correct copy of such original.

Rule VIII. Contested Probates. A copy of any objections filed to the probate of a last will and testament shall be served upon the proponent or upon his attorney in case the proponent shall have appeared by attorney.

In a contested probate proceeding, notice of trial shall be served and a note of issue filed as prescribed by section 150 of the Rules of Civil Practice.

In cases of contests in probate proceedings, where a notice of objection filed is required by section 148 of the Surrogate's Court Act, and, within five days after objections to the probate are filed, the proponent shall present a verified petition for, and procure and enter, an order directing such notice. If the proponent fails to present such petition and fails to procure and enter such order within five days after objections are filed, any other party to the proceeding may present such petition and order.

Rule IX. Jury Trials of Probate Cases. Within five days after a jury trial is demanded upon objections filed to the probate of a will, the party making the demand shall present, on two days' notice of settlement to the attorneys for all parties who have appeared by attorney, a proposed order directing such trial by jury. Such order shall state plainly and concisely the controverted questions of fact to be tried by jury. If a party demanding a trial by jury fails to serve and present a proposed order as aforesaid, such order may thereafter be presented by any party to the proceeding.

A jury fee of \$3.00 shall be paid to the Clerk before the jury is drawn.

Rule X. Accountings. When a petition for a voluntary accounting is presented, the account to which it relates must be filed therewith.

Upon an accounting of any executor, administrator with the will annexed or testamentary trustee, a copy of the will must be filed with the petition and account.

No decree will be entered on an accounting unless a receipt is filed or produced showing that the transfer tax on the estate has been paid or an order has been entered exempting the estate from transfer tax and that fact is stated in the petition.

Rule XI. Contested Accountings. On an accounting by an executor, administrator, guardian or trustee, any party interested, or a creditor, desiring to contest the account, shall file specific objections thereto and shall serve a copy thereof on the accounting party, or upon his attorney, in case he shall have appeared by attorney, within eight days after the filing of the account, where the accounting is a compulsory one; or upon the return day of the citation, or on or before such date as is fixed by the Surrogate, where the accounting is a voluntary one.

The contest of the account shall be confined to the items or matters objected to.

Rule XII. Affidavit of Regularity. With every proposed decree on an accounting there must be submitted an affidavit of regularity setting forth the necessary jurisdictional facts and that the rules of this Court have been complied with.

Rule XIII. Guardianship. No allowance will be made for the support, maintenance and education of an infant, unless the petition shows that an annual accounting has been properly filed or good cause is shown why it has not been filed. The petition shall show also the terms of any previous order made in the same estate, or, if none has been made, that fact shall be stated. An allow-

ance will be made for the period of one year only, except in exceptional cases, and the order must so provide.

When the infant is over fourteen years of age he shall join in the petition; and when application is made by any person other than the guardian of the property or a parent of the infant, it shall be made on at least two days' notice to such guardian or parent, or upon the duly acknowledged consent of such guardian or parent.

Rule XIV. Appearance of a General Guardian or Committee and Appointment of Special Guardians. When an infant over fourteen years of age applies for the appointment of a special guardian, or where an infant appears by his general guardian, or where a lunatic, idiot or habitual drunkard appears by his committee, the general or special guardian, or the committee, shall show by affidavit that such general or special guardian, or such committee, is competent to protect the rights of the infant or incompetent and has no interest adverse to that of the infant or incompetent, and is not connected in business with any party to the proceeding, or the attorney or counsel of such party. It must appear whether or not such general or special guardian or committee is entitled to share in the distribution of the estate or fund in which the infant or incompetent is interested, and, if the general or special guardian or committee is in any way interested in the estate or fund, the nature of such interest must be disclosed.

No party to a proceeding will be appointed special guardian of any other party thereto. The petition for the appointment of such special guardian, as well as the appearance filed by a general guardian of the infant, must in every instance disclose the name, residence and relationship to the infant of the person with whom the infant is residing and whether or not said infant has a parent living. If a parent is living, it must be shown by the affidavit of the parent whether or not such parent has knowledge of and approves such application or appearance. In case the parent has an interest adverse to the infant, the petition on the application for the appointment of such special guardian must be accompanied by the affidavit of the parent, showing in addition to such knowledge aforesaid, that such parent has not influenced the infant in the choice of the special guardian.

If the foregoing provisions of this rule are not strictly complied with, the Surrogate will, on his own motion, appoint a special guardian for such infant or incompetent, as provided in section 64 of the Surrogate's Court Act, notwithstanding the application of such infant or the appearance by the general guardian or committee.

Rule XV. Special Guardian's Report. Special guardians shall file their reports within eight days from the time of their appointment, except where an answer is filed and an adjournment is had, or the time to file the report is extended by the Surrogate. The report, or an accompanying affidavit, must state in detail the work done and the number of days spent in its performance.

Rule XVI. Referee's Report. A referee shall file with his report all the testimony taken and all the papers and exhibits that were before him in the proceedings in which the report is filed.

When a referee's report has been filed, said report shall be confirmed as of course unless exceptions thereto are filed by a party interested in the accounting

or proceeding within ten days after a written notice of such filing and a copy of such report shall have been served upon the opposing party; and in case exceptions shall be so filed, any party may bring on the hearing of said exceptions on any stated motion day on the same notice that would be required for the hearing of a motion.

Rule XVII. Notice of Settlement of Orders and Decrees in Litigated Motions. Two days' notice of the settlement of an order on a litigated motion or of a decree or decision shall be given in writing to all the parties who have appeared and to any special guardian in the proceeding in which such order, decree or decision is to be made.

Rule XVIII. Payment Into Court. All moneys paid into Court must be paid directly to the County Treasurer to the credit of the matter or proceeding. The Surrogate or Clerk will not receive such moneys.

Rule XIX. Application to Compromise Claims. The petition for leave to compromise any claim in favor of an estate, or the accompanying affidavits, must set forth the facts from which the Surrogate can determine that the proposed compromise is for the best interests of the estate.

Upon such application, the petitioner's attorney, if any, shall state the total amount of compensation he has received or is to receive from all sources, the net amount to be received by the petitioner as result of the settlement, whether or not he has become concerned in the application or its subject matter at the instance of the party with whom the compromise is proposed, and whether or not he has received or is to receive compensation from such party, and the amount thereof, if any.

The order of compromise will not pass upon or fix the fee of such attorney, but that question, if it should be raised by any person interested in the estate, will be determined upon the final accounting.

Rule XX. Filing Foreign Wills. All exemplified copies of foreign wills presented for record in this office, must be accompanied by a proper petition praying that the same be recorded.

Rule XXI. Transfer Tax Proceedings. In transfer tax proceedings, an original and a true copy of all proposed orders must be submitted.

Wyoming County.—James E. Norton, Surrogate, Warsaw, N. Y.

Court every Monday at Warsaw; second and last Fridays of each month at Attica; last Saturday in each month at office of Knight and Bentley, Arcade, except August.

No special rules.

Yates County.—Gilbert H. Baker, Surrogate, Penn Yan, N. Y.

Court at Penn Yan each Monday, except during August.

Allowances claimed by counsel in special proceedings in this Court will be made only upon the affidavit of the person interested in the allowance in such proceeding, such affidavit to be filed with the papers in the case, and to state fully what has been done in the proceeding, and such other matter as may be necessary for the information of the Court.

FORMS

There are no set forms adopted for use in Surrogates Courts, and therefore the forms used by Surrogates vary in their language. For that reason more than one form is often given here, and the practitioner may make his own choice of the forms which best suits the facts of his case, or is most used in his locality. The forms used in the largest counties are often more extended than those used in the smaller counties, and provide for more contingencies. Since forms cannot be devised to meet every possible case, it is often necessary in practice to combine parts of different forms. The section and paragraph numbers under the title refer to the section of the Surrogate's Act to which the form applies, and the paragraph of the book where the general subject is treated.

FORM No. 1.

Surrogate's Certificate of Disqualification.

[§ 11, ¶ 4]

SURROGATE'S COURT, County of

In the matter of the petition of.....
for the
of.

I,, Surrogate of the County of, do hereby certify, pursuant to section 11 of the Surrogate's Court Act, that I am disqualified to hear and determine the above entitled proceeding by reason of the fact that

Dated,

.....,
Surrogate.

FORM No. 2.

Certificate of Surrogate's Temporary Absence.

[§ 11, ¶ 41]

Pursuant to section 11 of the Surrogate's Court Act and for the purpose mentioned in section 9 and 11 of that act I hereby certify that Hon., Surrogate of the County of, is temporarily absent from his office.

Dated,

.....,
Clerk of the Surrogate's Court,
or
Clerk of the County of

[783]

FORM No. 3.**Surrogate's Certificate of Disqualification in a Particular Matter.**

[§ 6, ¶ 3]

SURROGATE'S COURT, County of

In the matter of the petition of.....	}
for the	
of.	

I,, Surrogate of the County of, do hereby certify, pursuant to section 6 of the Surrogate's Court Act, that I am disqualified to hear and determine the above entitled proceeding by reason of the fact that my relations to the parties interested and to the subject matter of the proceeding have been such that it is improper for me to act as surrogate in relation thereto.

Dated,

.....,
Surrogate.**FORM No. 4****Subpoena for Witness.**

[§ 20, ¶ 6]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God, Free and Independent.

To..... Greeting: We command you, that, all and singular business and excuses being laid aside, you appear and attend before the Surrogate of the County of, at a Surrogate's Court, to be held in and for the County of, at the Surrogate's Office in the of, N. Y., on the day of, 192 , at o'clock in the noon to testify and give evidence in a certain special proceeding now pending in said Court, entitled:

In the matter of
And for a failure to attend you will be deemed guilty of a contempt of court, and liable to pay all damages sustained thereby by the party aggrieved, and forfeit fifty dollars in addition thereto.

Witness, Hon., Surrogate of our said County, at the
..... of, the day of, 192 .

.....,
Clerk of the Surrogate's Court.

or

Attorney for

FORM No. 5.

Subpoena Duces Tecum.

[§ 20, ¶ 6]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God, Free and Independent.

To, Greeting:

We command you, that, all and singular business and excuses being laid aside, you and each of you appear and attend before the Surrogate of the County of, at a Surrogate's Court, to be held in and for the County of, at the Surrogate's Office, in the of, on the day of, 192 , at o'clock in the noon, to testify and give evidence in a certain special proceeding now pending in said court, entitled: In the Matter of late of the of deceased. And you are hereby required to bring with you and then and there produce now in your custody or control, and all other deeds, evidences and writings which you have in your custody or power concerning the premises. And for failure to attend you will be deemed guilty of a contempt of court, and liable to pay all damages sustained thereby by the party aggrieved, and forfeit fifty dollars in addition thereto.

In Witness Whereof, we have caused the seal of office of our said surrogate to be hereunto affixed.

Witness: Hon., Surrogate of our said county, at the [L. S.] of, the day of, 192 .

.....,
Clerk of the Surrogate's Court,
or
Attorney for

FORM No. 6.

Waiver of Citation, and Notice of Appearance.

[§ 41, ¶ 20]

SURROGATE'S COURT, County of

In the matter of the petition of..... }
for the }
of. }

.....
of the of, in the county of, and State

of, being interested as in the above entitled proceeding, do hereby waive the issue and service of a citation therein; and do hereby appear in such proceeding and authorize such appearance to be entered on the record.

Dated,

STATE OF NEW YORK, }
County of, } ss.:

On this day of, 192 , personally appeared before me to me well known to be the same person described in and who executed the foregoing instrument and who duly acknowledged the execution of the same for the purposes therein mentioned.

NOTE.—If the acknowledgment be taken outside the State of New York a certificate must be procured from the County Clerk of the *county in which the officer taking the acknowledgment resides*. This certificate must show that the officer taking the acknowledgment is an officer of the State where it is taken and is authorized, by the laws thereof, to *take the acknowledgment of deeds to be recorded therein*; that said clerk is well acquainted with such officer's handwriting and believes the signature to the original certificate to be genuine.

FORM No. 7.

Authentication for Use of Foreign County Clerk or Clerk of Court.

STATE OF, }
County of, }

I,, Clerk of the County of (and also Clerk of the, the same being a court of record of the aforesaid county, having by law, a seal), do hereby certify that, Esquire, whose name is subscribed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking said acknowledgment, proof or affidavit, a duly commissioned and sworn and residing in said county, and was, as such, an officer of said State, duly authorized by the laws thereof, to take and certify the same, as well as to take and certify the proof and acknowledgment of deeds and other instruments in writing to be recorded in said State, and that full faith and credit are and ought to be given to his official acts; and I further certify that I am well acquainted with his handwriting, and verily believe that the signature to the attached certificate is his genuine signature.

In Witness Whereof, I have hereunto set my hand and affixed my official [L. S.] seal this day of, 192 .

.....,

FORM No. 8.

Waiver of Citation.

[§ 41, ¶ 20]

SURROGATE'S COURT, County of

In the matter of the petition of.....	}
for the	
of.	

.....
of the of in the County of and State
of, being interested as in the above entitled pro-
ceeding, do hereby waive the issue and service of a citation therein.

Dated,

STATE OF NEW YORK, }
County of, } ss.:

On this day of, 192 , personally appeared before me
.....
to me well known to be the same person described in and who executed the
foregoing instrument and who duly acknowledged the execution of the same for
the purposes therein mentioned.

FORM No. 9.

Notice of Appearance in Person by Party Served with Citation.

[§ 63, ¶ 30]

SURROGATE'S COURT, County of

In the matter of the petition of.....	}
for the	
of.	

The undersigned being persons who have been served with citation in the
above entitled proceeding appear therein in person on this day of,
192 .

FORM No. 10.**Notice of Appearance by Persons not Served with Citation.**

[§ 41, ¶ 20]

SURROGATE'S COURT, County of

In the matter of the petition of.....	}
for the	
of.....	

The undersigned being persons interested in the above entitled proceeding as and who have not been served with citation therein, hereby appear personally in, and make ourselves parties to, such proceeding as though named in the petition and citation and personally served with the citation.

Dated,, 192 .

.....,
Postoffice address

.....,
Postoffice address

STATE OF NEW YORK, }
County of, } ss.:

On this day of, 192 , personally appeared before me
to me well known to be the same person described in and who executed the foregoing instrument and who duly acknowledged the execution of the same for the purposes therein mentioned.

FORM No. 11.**Authorization of Attorney to Appear for Person not Served with Citation.**

[§ 41, ¶ 20]

SURROGATE'S COURT, County of

In the matter of the petition of.....	}
for the	
ofDeceased.	

I, the undersigned being a person interested in the above entitled proceeding as and who has not been served with citation

therein, hereby authorize, Esq., to appear for me in such proceeding, and such appearance by him shall have the same effect as to me as though I were named in the petition and citation and had been duly served with such citation and duly appeared in person and made myself a party to such proceeding.

Dated,, 192 .

.....
Postoffice address

STATE OF NEW YORK, }
County of, } ss.:

On this day of, 192 , personally appeared before me
to me well known to be the same person described in and who executed the foregoing instrument and who duly acknowledged the execution of the same for the purposes therein mentioned.

FORM No. 12.

Notice of Appearance by Attorney for Person not Served with Citation.

[§ 41, ¶ 20]

SURROGATE'S COURT, County of

In the matter of the petition of..... }
for the }
ofDeceased. }

Take notice, that have been retained by and appear for
a person interested as in the above entitled proceeding, who has not been served with citation therein, and do hereby make such person a party to such proceeding pursuant to a duly executed authorization filed herewith, and demand that all notices and papers be served upon at postoffice address given below.

.....
Attorney for
.....
Office and Postoffice address.

FORM No. 13.**Notice of Appearance by Attorney.**

[§§ 41, 63, ¶¶ 20, 30]

SURROGATE'S COURT, County of

In the matter of the petition of.....	}
for the	
of.	

Take notice, that retained by and appear for
 part to the above entitled proceeding, and demand that all notices and
 papers herein be served on at address given below.

.....,
 Attorney for said part
 Office and P. O. Address.

.....,
 To the Surrogate's Court, and to
 Attorney for Petitioner.

FORM No. 14.**Designation of Clerk of Court Upon Whom Service may be Made.
General.**

[§ 95, ¶ 105]

SURROGATE'S COURT, County of

In the matter of the petition of.....	}
for the	
of.	
Deceased.	

I,, the petitioner in this proceeding, residing at No.
, do hereby designate the Clerk of the Surrogate's Court of the
 County of and his successor in office as a person on whom service
 of any process issuing from said court in this proceeding or in any other pro-
 ceeding which shall affect the estate of the said (or the property
 or fund referred to therein), may be made in like manner and with like effect
 as if it were served personally upon me whenever I cannot be found and served
 within the State of New York after due diligence used.

Dated,

STATE OF NEW YORK, }
 County of, } ss.:

On this day of, 192 , personally appeared before me

 to me well known to be the same person.. described in and who executed the
 foregoing instrument and who duly acknowledged the execution of the same
 for the purposes therein mentioned.

FORM No. 15.

Designation of Clerk of Surrogates' Court to Receive Service of Process —Administration.

[§ 95, ¶ 105]

SURROGATE'S COURT, County of New York.

In the matter of the application for letters of administration on the goods, chattels and credits of <div style="text-align: right;">Deceased.</div>	}
---	---

I,, the petitioner herein for letters of administration on the
 goods, chattels and credits of, deceased, a resident of,
 do hereby designate the Clerk of the Surrogate's Court and his successor in office
 as a person on whom any process issuing from the Surrogate's Court of the
 County of New York may be made in like manner and with like effect as if it
 were served personally upon me, whenever I cannot be found and served within
 the State of New York after due diligence used. I reside at No.,
 New York City.

Dated,

STATE OF NEW YORK, }
 County of, } ss.:

On this day of, 192 , personally appeared before me

 to me well known to be the same person described in and who executed the
 foregoing instrument and who duly acknowledged the execution of the same
 for the purposes therein mentioned.

FORM No. 16.

**Designation of Clerk of Surrogates' Court to Receive Service of Process
—Guardianship.**

[§ 95, ¶ 105]

SURROGATE'S COURT, County of New York.

In the matter of the application for letters of
guardianship of the person and estate of...
.....
A Minor.

I,, the petitioner herein for letters of guardianship of the person and estate of, a minor, do hereby designate the Clerk of the Surrogate's Court of the County of New York, and his successor in office, as a person on whom service of any process issuing from the Surrogate's Court of the County of New York may be made, in like manner and with like effect as if it were served personally upon me, whenever I cannot be found and served within the State of New York after due diligence used. I am a resident of No.

Dated,
STATE OF NEW YORK, }
County of, } ss.:

On this day of, 192 , personally appeared before me
to me well known to be the same person described in and who executed the foregoing instrument and who duly acknowledged the execution of the same for the purposes therein mentioned.

FORM No. 17.

Certificate of Grant of Letters of Administration.

STATE OF NEW YORK, }
County of, } ss.:

SURROGATE'S COURT.

I,, Clerk of the Surrogate's Court of said county, do hereby certify that on the day of, 19.., w... appointed the administrat... of all and singular the goods, chattels and credits of, late of the of, in said county, deceased, and that letters of administration have been issued to the said in due form of law, ..he.. having first taken and subscribed the oath prescribed by law, as such administrat....

And I do further certify that the letters of administration so issued as aforesaid are still in force and unrevoked.

In Testimony Whereof, I have hereunto subscribed my name and affixed
[L. S.] the seal of the court this day of, 19..

.....,

Clerk of the Surrogate's Court.

FORM No. 18.

Certificate of Grant of Letters Testamentary. Bond Filed.

STATE OF NEW YORK, }
County of, } ss.:
SURROGATE'S COURT.

I,, Clerk of the Surrogate's Court of said county, do hereby certify that on the day of, 19.., the last will and testament of, late of the of, N. Y., deceased, was duly admitted to probate as a will of real and personal estate, and that of the of, in the County of, execut.... named in said will, ha.. been duly appointed such execut.... and ha.. taken and subscribed the oath prescribed by law as such execut.... and has filed the bond as required by the court. And I do further certify that the letters testamentary, so issued as aforesaid, are still in force and unrevoked.

In Testimony Whereof, I have hereunto subscribed my name and affixed
[L. S.] the seal of the court this day of, 19..

.....,

Clerk of the Surrogate's Court.

FORM No. 19.

Certificate of Grant of Letters of Administration.

THE PEOPLE OF THE STATE OF NEW YORK,

To all to whom these presents shall come or may concern, send Greeting:

This is to Certify, That after having examined the records and files of the Surrogate's Court of the County of Erie, State of New York, now remaining in the Surrogate's office of said County of Erie, I find that on the day of, 192 , letters of administration upon the personal estate of, late of the City of Buffalo, in said County of Erie, deceased, were duly granted by the said court to and that said letters are still valid and in full force.

In Testimony Whereof, We have caused the seal of our said Surrogate's
[L. S.] Court to be hereunto affixed, at the City of Buffalo, in said County of Erie, this day of, 192 .

.....,

Clerk of the Surrogate's Court.

FORM No. 20.**Certificate of Grant of Letters of Guardianship.**

STATE OF NEW YORK, }
 County of } ss.:

SURROGATE'S COURT.

I,, Clerk of the Surrogate's Court of said County of, do hereby certify that on the day of, 192 , letters of guardianship of the person and estate of of the of of said county, minor..., were duly issued and granted to of the of in said county, he having first executed and filed the bond required by statute, as general guardian of said minor..., and taken and subscribed the oath prescribed by law as such guardian. And I do further certify that the letters of guardianship, so issued as aforesaid, are still in force and unrevoked.

In Testimony Whereof, I have hereunto subscribed my name and affixed
 [L. S.] the seal of the court this day of, 192 .

.....,
 Clerk of the Surrogate's Court.

FORM No. 21.**Certificate of Grant of Ancillary Letters Testamentary.**

STATE OF NEW YORK, }
 County of } ss.:

SURROGATE'S COURT.

I,, Clerk of the Surrogate's Court of said county, do hereby certify that on the day of, 192., ancillary letters testamentary on the last will and testament of, late of, in the State of, deceased, were granted to of, State of, executor named in said will, and who has been duly appointed ancillary executor by the Surrogate's Court of County, New York, and has taken and subscribed the oath and duly qualified as prescribed by law as such ancillary executor.

And I do further certify that the ancillary letters testamentary so issued as aforesaid are still in force and unrevoked.

In Testimony Whereof, I have hereunto subscribed my name and affixed
 [L. S.] the seal of the court this day of, 192 .

.....,
 Clerk of the Surrogate's Court.

FORM No. 22.**Certificate of Grant of Letters Testamentary.**

THE PEOPLE OF THE STATE OF NEW YORK,

To all to whom these presents shall come or may concern, send Greeting:

This is to Certify, That after having examined the records and files of the Surrogate's Court of the County of Erie, State of New York, now remaining in the Surrogate's office of said County of Erie, I find that on the day of, 192 , letters testamentary of the last will and testament of, late of the City of Buffalo, in said County of Erie, deceased, were duly granted by the said court to executor in said will named, and that said letters are still valid and in full force.

In Testimony Whereof, We have caused the seal of our said Surrogate's [L. S.] Court to be hereunto affixed, at the City of Buffalo, in said County of Erie, this day of, 192 .

.....,

Clerk of the Surrogate's Court.

FORM No. 23.**Certificate of Grant of Ancillary Letters of Administration.**

STATE OF NEW YORK, }
County of, } ss.:
SURROGATE'S COURT.

I,, Clerk of the Surrogate's Court of said county, do hereby certify that on the day of, 192 , w..... appointed the ancillary administrator of all and singular the goods, chattels and credits of, late of the, in the State of, deceased, and that ancillary letters of administration have been issued to the said in due form of law, ...he... having first taken and subscribed the oath and duly qualified as prescribed by law, as such administrator.

And I further certify that ancillary letters of administration so issued as aforesaid are still in force and unrevoked.

In Testimony Whereof, I have hereunto subscribed my name and affixed [L. S.] the seal of the court this day of, 192 .

.....,

Clerk of the Surrogate's Court.

FORM No. 24.**Certificate to be Attached to Copy of Original Record.**

STATE OF NEW YORK, }
 County of } ss.:
 SURROGATE'S COURT.

I,, Clerk of the Surrogate's Court of said county, do hereby certify that I have compared the annexed copy with original record thereof remaining in this court, and recorded herein the day of, 19.., in the book of Surrogate's Records, No., page, and that the said copy is a correct transcript of said original record, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed
 [L. S.] the seal of the court this day of, 192 .

.....,
 Clerk of the Surrogate's Court.

FORM No. 25.**Certificate to be Attached to Copy of Original Record.**

STATE OF NEW YORK, }
 County of } ss.:

I,, Clerk of the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of of deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of Bronx, this day of, in the year of our Lord one thousand nine hundred and twenty.

.....,
 Clerk of the Surrogate's Court.

FORM No. 26.**Certificate Verifying Testimony.**

SURROGATE'S COURT, County of Bronx.

In the matter of the probate of a paper propounded as the last will and testament of

 Deceased.

New York,, 192 .

I Hereby Certify, That the foregoing record of the testimony in the above-

entitled proceeding is a full and correct transcript of the stenographic notes taken by me therein, and that the copies of exhibits or other papers contained in such record are full and correct copies thereof.

.....,
Stenographer to the Surrogate's Court
of the County of Bronx.

FORM No. 27.

Certificate of Probate to be Attached to Original Will.

[§ 151, ¶ 74]

SURROGATE'S COURT, Erie County.

In the matter of proving the last will and
testament of
Deceased.

STATE OF NEW YORK, }
County of Erie. } ss.:

I,, Clerk of the Surrogate's Court, of said County of Erie, do hereby certify in pursuance of section 151 of the Surrogate's Court Act, that on the day of the date hereof, the last will and testament of deceased being the annexed written instrument, was upon due proof duly admitted to probate by the Surrogate's Court of the County of Erie and by the Surrogate of said County, as and for the last will and testament of said deceased, and as a will valid to pass real and personal property.

Said last will and testament is recorded in the office of said Surrogate, in Liber of Wills, at page

In Testimony Whereof, I have hereunto subscribed my name and affixed
[L. S.] the seal of office of the Surrogate of said County, this day of
....., in the year of our Lord one thousand nine hundred and
twenty-

.....,
Clerk of the Surrogate's Court.

FORM No. 28.

Certificate of Probate to be Attached to Original Will.

[§ 151, ¶ 74]

SURROGATE'S COURT, County of New York.

Be it remembered, that in pursuance of section 151 of the Surrogate's Court Act, I hereby certify that on the day of, 192 , the last

will and testament of, deceased, being the foregoing written instrument, was upon due proof duly admitted to probate by the Surrogate's Court of the County of New York, and by the Surrogate of said county, as and for the last will and testament of said deceased, and as a will valid to pass property. Said last will and testament is recorded in the office of said Surrogate in liber of Wills, page

In Testimony Whereof, I have hereupon subscribed my name and affixed [L. S.] the seal of office of the Surrogate of said county, this day of, 192 ..

.....,
Clerk of the Surrogate's Court.

FORM No. 29.

Certificate to be Attached to Copy of Will Filed but not yet Probated.

STATE OF NEW YORK, }
County of Bronx, } ss.:

I,, Clerk of the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of the instrument propounded as the last will and testament (and codicil) of deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of Bronx, this day of, in the year of our Lord one thousand nine hundred and twenty- ..

.....,
Clerk of the Surrogate's Court.

FORM No. 30.

Certificate Showing Recording of Exemplified Copy of Foreign Will.

[§ 151, ¶ 74]

SURROGATE'S COURT, County of New York.

Be it Remembered, that in pursuance of section 151 of the Surrogate's Court Act, I hereby certify that on the day of, 192.., an exemplification of the last will and testament of, deceased, being the foregoing written instrument, was filed for record in the Surrogate's Court of the County of New York, as and for a copy of the last will and testament of, said deceased, and as a will valid to pass real property. Said

last will and testament and proofs are recorded in the office of said Surrogate in Liber of Wills, page

In Testimony Whereof, I have hereunto subscribed my name and affixed
[L. S.] the seal of office of the Surrogate of said county, this day
of, 192..

.....,
Clerk of the Surrogate's Court.

FORM No. 31.

Certificate on Exemplification to be Attached to Copies of Papers.

All which we have caused by these presents to be exemplified, and the Seal of our said Surrogate's Court to be hereunto affixed.

Witness Hon., Surrogate of the County of Bronx, at The City of New York, the day of, in the year of our Lord one thousand nine hundred and twenty- and of our independence the one hundred and

.....,
Clerk of the Surrogate's Court.

I, Surrogate of said County and presiding Magistrate of the Surrogate's Court, do hereby certify that, whose name is subscribed to the preceding exemplification, is the Clerk of said Surrogate's Court of the County of Bronx, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogate's Court, and that the attestation thereof is in due form, and according to the form of attestation used in this State.

Dated, New York,, 192...

.....,
Surrogate.

STATE OF NEW YORK, }
County of Bronx, } ss.:

I,, Clerk of the Surrogate's Court of the County of Bronx, do hereby certify that, whose name is subscribed to the preceding certificate, is the presiding Magistrate of the Surrogate's Court of the County of Bronx, duly elected, sworn and qualified, and that the signature of said Magistrate to said certificate is genuine.

In Testimony Whereof, I have hereto set my hand and affixed the seal of the said Court, this day of, 192..

.....,
Clerk of the Surrogate's Court.

FORM No. 32.

Certificates to be Attached to Exemplified Copy of Will.

[§ 44, Dec. Est. L., ¶ 75]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God, Free and Independent,

To all to whom these presents shall come or may concern, Greeting:

Know ye, That we having examined the records and files in the office of the Surrogate of the County of New York, do find there remaining a certain record of the last will and testament of, deceased, together with the probate thereof and the letters testamentary granted thereon (said will having been duly admitted to probate as a will of real and personal property on the day of, in the year one thousand nine hundred and, and executed and proven agreeably to the laws and usages of the State of New York), in the words and figures following, to wit

All which we have caused by these presents to be exemplified, and the seal of our said Surrogate's Court to be hereunto affixed.

Witness, Hon., a Surrogate of the County of New York, at the city of New York, the day of, in the year of our Lord, one thousand nine hundred and, and of our independence, the one hundred and thirty-.....

.....
Clerk of the Surrogate's Court.

I,, a Surrogate of said county, and presiding magistrate of the Surrogate's Court, do hereby certify that, whose name is subscribed to the preceding exemplification, is the clerk of said Surrogate's Court of the County of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogate's Court, and that the attestation thereof is in due form, and according to the form of attestation used in this State.

Dated, New York,

.....
Surrogate.

STATE OF NEW YORK, }
County of New York, } ss.:

I,, Clerk of the Surrogate's Court of the County of New York, do hereby certify that Hon., whose name is subscribed to the preceding certificate, is the presiding magistrate of the Surrogate's Court of the County of New York, duly elected, sworn and qualified, and that the signature of said magistrate to said certificate is genuine.

In Testimony Whereof, I have hereto set my hand and affixed the seal of said court, this day of, 192..

.....
Clerk of the Surrogate's Court.

Special Requirements in Some States.

For use in the State of Nebraska insert the words "of law" after "form," first used in the last sentence of the Surrogate's certificate.

For use in the State of Colorado a special certificate is required in accordance with a statute distinctly providing that the record of the court in which the (foreign) will is probated should be "accompanied with a certificate of the proper officer or officers that said will, testament or codicil, or copy thereof, was proved agreeably to the laws and usages of the State, Territory or County in which the same was admitted to probate."

The following has been accepted:

STATE OF NEW YORK,
SURROGATE'S COURT, County of Rensselaer.

In the matter of the probate of the last will and testament of, late of Troy, N. Y.,	} Deceased.
--	------------------------

I,, Surrogate of Rensselaer County, N. Y., do hereby certify that on the 7th day of April, 1908, the last will and testament of, late of Troy, N. Y., deceased, was proved before me agreeably to the laws and usages of the State of New York, and was accordingly duly admitted by me to probate as a will of real and personal estate.

In Testimony Whereof, witness my hand and the official seal of my court, duly attested, this 18th day of May, 192..

.....,
Surrogate.

Attest:

.....,
Clerk of the Surrogate's Court.

FORM No. 33.

Certificate Mentioned in Section 343, Real Property Law, to be Used on Application to Discharge Ancient Mortgage.

STATE OF NEW YORK, }
County of Rensselaer, } ss..
City of Troy, }

I,, Surrogate of Rensselaer County, State of New York, do hereby certify that upon a search of the indices to the records in the Surrogate's office of said county from the year to date no letters testa-

mentary or of administration are found to have been issued under the will or upon the estate of

Witness my hand and seal this day of, 192..

.....,
Surrogate of Rensselaer County.

FORM No. 34.

Certificate Showing Payments Under Decree of Judicial Settlement.

SURROGATE'S COURT—Rensselaer County.

In the matter of the estate of

I hereby certify, that 'on the day of, 192.., a decree was made and duly entered in this court judicially settling and allowing as filed and adjusted the final account of, as, and further decreeing, that upon the filing in this court of the receipts for the respective amounts therein decreed to be paid, the said, and the sureties on h.... official bond be discharged from further liability in this matter.

I further certify, that receipts and releases duly executed, showing that all sums have been paid out and distributed by said, pursuant to the terms of said decree, have been duly filed in this court.

In Testimony Whereof, I have hereunto subscribed my name and affixed [L. S.] the seal of this court this day of, 192..

.....,
Clerk of the Surrogate's Court.

FORM No. 35.

Certificate Showing Authority of Executor to Execute Release.

STATE OF NEW YORK,)
County of, { ss.:
SURROGATE'S COURT.

I,, Clerk of the Surrogate's Court of said county, which court is a court in which according to the laws of the State, wills are admitted to probate and letters testamentary thereon are issued, do hereby certify that on the day of, 192.., the last will and testament of, late of the City of, deceased, was duly admitted to probate as a will of real and personal property in the said Surrogate's Court, and that, of the City of, County of, N. Y.,

the executor named in said will, has been duly appointed such executor, and has taken and subscribed the oath prescribed by law as such executor, and that letters testamentary thereon were issued to him and are still in full force and unrevoked.

I further certify that, to me known to be the person who executed the said release, was and is the sole executor under the will of said, deceased, acting as such officer under authority of said court, and as such executor he at the time of the execution of said release had authority and still has authority to execute such release under the laws of the State of New York.

In Testimony Whereof, I have hereunto subscribed my name and affixed
[L. S.] the seal of said court this day of, 192..

.....,
Clerk of the Surrogate's Court.

FORM No. 36.

Certificate Approving Surety on Bond to be Used in Another County.

Rensselaer County, ss.:

I,, Surrogate of Rensselaer County, do hereby certify that if the within bond were presented to me for approval in a proceeding of which I had jurisdiction, I would accept A. B. and C. D. as sureties thereon.

Dated,

[L. S.]

.....,
Rens. Co. Surrogate.

FORM No. 37.

Certificate of Search.

STATE OF NEW YORK, }
County of Bronx, } ss.:

I,, Clerk of the Surrogate's Court of said County, do hereby certify that I have made a search of the records of this Court, in the matter of the estate of and find as follows:

In Testimony Whereof, I have hereunto set my hand and affixed the
[L. S.] seal of the Surrogate's Court of the County of Bronx, this day
of, in the year of our Lord one thousand nine hundred and

.....,
Clerk of the Surrogate's Court.

FORM No. 38.**Verification by Attorney.**

[§ 50, ¶ 25]

STATE OF NEW YORK, {
 County of, } ss.:

E. A. P., being duly sworn, says that he is the attorney for the petitioner in the above-entitled proceeding; that the foregoing petition is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. The reason why this verification is made by deponent and not by the petitioner is that the petitioner is not within the County of Rensselaer, within which county petitioner's attorney resides. The source of deponent's information and the grounds of his belief as to the matters set forth in the petition herein are: A copy of the inventory of the estate, filed in the Surrogate's Court; the books and accounts of the estate and vouchers or receipts for bills paid; searches of the property showing decedent's interest therein, all of which are in deponent's possession (or the original will which is in deponent's possession together with statements made by said executor and relatives of the deceased showing the names of the heirs-at-law and next of kin and correspondence concerning the same, memoranda of decedent's property and personal examination of the records in the county clerks and Surrogate's office).

E. A. P.

Sworn to before me this

day of, 192..

N. F. W.,

Notary Public, Albany County.

(Certificate filed in Rensselaer County.)

FORM No. 39.**Notice of Motion.**

SURROGATE'S COURT, County of

_____ }
 In the matter of the petition of..... }
 for }
 of }
 _____ } Deceased.

Sir:

Please take notice, that upon the petition and already filed in this proceeding, and upon the affidavit served herewith, a motion will be

made before the Surrogate's Court held at the in the
 of, N. Y., on the day of, 19.., at 10 o'clock
 a. m., or as soon thereafter as counsel can be heard for an order or direction
 of such court that and for such further order or relief as may be
 just in the premises.

Dated,, 192..

.....,

Attorney for,

Office and post office address,

.....

To

FORM No. 40.

General Citation to Show Cause.

[§ 53, ¶ 26]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God Free and Independent Send Greeting.

To:

Upon the petition of of you are hereby cited
 to show cause before the Surrogate's Court of County at the
 Court House in the City of on the day of, 192..,
 at 10 o'clock in the forenoon, why a decree should not be granted (here insert
 the purpose of the decree and the name of the person to whose estate or fund
 the proceeding relates, and his last residence).

In Testimony Whereof, we have caused the seal of our said Surrogate's
 Court to be hereunto affixed.

Witness, Hon., Surrogate of the County of,
 at the Surrogate's office in the city of, this

[L. S.] day of, in the year of our Lord, one thousand nine
 hundred and twenty-.....

.....,

Clerk of the Surrogate's Court.

.....,

Attorney for Petitioner.

Office and post office address,

FORM No. 41.**General Citation to Show Cause.**

[§ 53, ¶ 26]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God Free and Independent Send Greeting:

To

Upon the petition of, who resides at, you and each of you are hereby cited to show cause before the Surrogate's Court of New York County, held at the Hall of Records in the County of New York on the day of, 192., at half past ten o'clock in the forenoon of that day, why (set forth the object of the proceeding and the name and last residence of the person to whose estate or fund the proceeding relates [§ 53]).

In Testimony Whereof, We have caused the seal of the Surrogate's Court of the said County of New York to be hereunto affixed.

Witness, Honorable, a Surrogate of our said County, at the [L.S.] County of New York, the day of, in the year of our Lord one thousand nine hundred and

.....,
Clerk of the Surrogate's Court.

FORM No. 42.**General Citation to Unknown Persons.**

[§ 54, ¶ 26]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God Free and Independent Send Greeting.

To, if she be living, whose place of residence is unknown and cannot after due diligence be ascertained or if she be dead, the husband, heirs-at-law, next of kin and personal representatives of said, whose places of residence are unknown and cannot after due diligence be ascertained; whose places of residence are unknown and after diligent effort cannot be ascertained; and to all the heirs-at-law and next of kin of late of the of in the County of Rensselaer, deceased.
(Continue as in usual form above.)

FORM No. 43.

Admission of Service to be Endorsed on Copy Citation.

[§ 61, ¶ 29]

I,, being of full age, and the person named in said citation hereby admit due and personal service of the citation of which the within is a true copy at, N. Y., on the day of, 192..

STATE OF NEW YORK, }
County of, } ss.:

On this day of, 192.., personally appeared before me, to me well known to be the same person.. described in and who signed the foregoing admission of service and acknowledged that ..he.. signed the same for the purposes therein mentioned.

FORM No. 44.

General Affidavit for Order for Service by Publication, etc.

[§§ 48, 56, ¶¶ 24, 28]

The Surrogate from whose court the citation is issued may make an order directing the service thereof without the State, or by publication, in either of the following cases:

- Upon a foreign corporation.
 - Upon a person not a resident of the State.
 - Upon a resident of the State who has departed therefrom with intent to defraud creditors or to avoid service of process.
 - Upon a resident, adult or infant of the State temporarily absent therefrom.
- Where an attempt was made to serve on a resident of the State, or a domestic corporation, a citation issued from the same Surrogate's Court, upon the presentation of the same petition, before the expiration of the limitation applicable to the enforcement of the claim set forth in the petition, and the limitation would have expired within sixty days next preceding the application for the order, if the time had not been extended by the attempt to serve the citation. [From §§ 48, 56, Sur. Ct. A.]

SURROGATE'S COURT, County of

In the matter of the
of.
Deceased.

STATE OF NEW YORK, }
County of, } ss.:

....., being duly sworn, says that he is the (executor of the last will, etc.), of late of the of, Rensselaer

County, deceased. That certain of the heirs-at-law and next of kin, legatees and persons interested in the estate of the said, deceased, are not residents of the State of New York, and certain others of said persons are temporarily absent therefrom. Deponent further says that he is informed and believes that the places of residence and postoffice addresses of those persons who reside outside the State of New York are as follows:

A. B. who resides at No. Tenth street,, Illinois.

C. D. who resides at No. Eighth avenue, Maryland.

That is temporarily absent abroad and last-known address to this deponent is C/O, London, England;

That is not at place of residence, to-wit, No. Fifth avenue, New York, N. Y., and that said residence is closed, and deponent is informed that the said has left the said city for the summer and is temporarily at or near, New Hampshire, and that the latter is postoffice address.

That no one of the foregoing persons is in the State of New York at the present time and neither personal service nor substituted service can be made on any of them within the said State.

Sworn to before me this

day of, 192..

.....
.....

FORM No. 45

General Order for Service by Publication.

At a Surrogate's Court, held in and for the County of Saratoga, at the Surrogate's office, in the City of Saratoga Springs, on the day of 192..

Present: Hon., Surrogate.

In the matter of the.....
of
Deceased.

A citation having been duly issued out of the Surrogate's Court of Saratoga County, directed to the persons and corporations hereinafter named, requiring them to show cause before the Surrogate on the day of, 192.., why the prayer of the petitioner in the above-entitled proceeding should not be granted, now, on reading and filing proof to the satisfaction of the Surrogate that upon whom the citation in this matter

is directed are foreign corporations or persons who are not residents of the State, and that are residents of the State and that substituted service upon them cannot be authorized as provided in Section 55 of the Surrogate's Court Act, and that there are persons whose names or places of residence cannot with due diligence be ascertained and who are designated herein as (heirs, next of kin, legatees, etc.), and that are unknown creditors, next of kin, heirs, legatees or persons otherwise interested either individually or included in a class to whom the citation herein has been directed designating them by a general description as prescribed in the Surrogate's Court Act, it is

Ordered, That service of said citation upon the persons or corporations above-named be made by publication thereof in two newspapers, to-wit: published at, and, published at, for four weeks, once in each successive week, or at the option of the petitioner by delivering a copy of the citation without the State to each of the persons above-named in person, and if any person to be served is an infant under fourteen years of age, a further copy shall in the same manner be served upon the father, mother, guardian or person with whom such infant is sojourning.

It is further Ordered that on or before the day of the first publication the petitioner deposit in the post office at a copy of the citation contained in a securely closed post paid wrapper directed to at, another copy of said citation contained in a like wrapper directed to at, and that as to the said the Surrogate being satisfied by the proof upon which this order is granted that the petitioner cannot with reasonable diligence ascertain a place or places where said persons would probably receive matter transmitted through the post office, the Surrogate dispenses with the deposit of any papers.

.....,
Surrogate.

FORM No. 46.

Order for Additional Service on Infant, Drunkard, or Incompetent Party.

[§ 60, ¶ 27]

SURROGATE'S COURT, County of

(Caption.)

In the matter of the petition of
for
of
Deceased.

A petition having been filed by praying that and it appearing from said petition that therein named is an infant;

(habitual drunkard, an alleged, or adjudged, incompetent person, as the case may be) and the Surrogate having determined that the circumstances require that a copy of the citation be delivered to another person in the interest of said;

It is Ordered, That a copy of such citation be also delivered to and left with residing at in behalf of said at least days before the return day thereof, and that the service of such citation shall not be deemed complete until such delivery.

.....,
Surrogate.

FORM No. 47.

Order Designating Person to Receive Citation.

[§ 60, ¶ 27]

At Chambers of the Surrogate's Court held in and for the County of New York, at the Hall of Records, in the County of New York, on the day of, in the year nineteen hundred and

Present: Honorable, Surrogate.

In the matter of the	}
of	
Deceased.	

Upon the petition of (executor-administrator), of the estate of, deceased, who at the time of his death was a resident of, and it appearing by the petition that (is an infant, incompetent):

It is Ordered, That a copy of the citation herein be also delivered to and left with, Esq., counselor-at-law, of the City of New York, in behalf of said at least eight days before the return day of said citation, and that the service of said citation shall not be deemed complete until such delivery.

.....,
Surrogate.

FORM No. 48.

Proof of Mailing Copy of Citation and Order.

[§ 61, ¶ 27]

STATE OF NEW YORK, }
County of, } ss.:

..... of the of, in said county, being duly sworn says that in pursuance of the directions contained in the annexed

order, this deponent did, on the day of, 192.., deposit in the post office at the City of, in said County of, copies of the annexed printed citation, inclosed in separate envelopes, properly sealed, with the lawful postage thereon prepaid, directed to the persons named in the annexed order, as follows, viz.:

Sworn to before me this }
 day of, 192.. }
,
 Notary Public.

FORM No. 49.

Proof of Service of Citation on Infant Under Fourteen.

[§ 55, ¶ 27]

SURROGATE'S COURT, }
 Albany City and County. } ss.:

..... of, being duly sworn, says his age is years. That on the day of, 192.., at in the County of and State of he served the annexed citation on therein named, a minor under the age of fourteen years, by delivering to and leaving a copy thereof with the said minor personally, and also by delivering to and leaving a copy thereof with h.... father, (mother) (guardian) personally, (with personally, being the person having the care and control of said minor (with whom said minor resides), (in whose service said minor is employed), (said minor having no father, mother or guardian within the State of New York, and not residing with a parent.) That he knew the infant so served to be one of the persons mentioned and described in said citation.

Sworn to before me this day
 of, A. D., 192..

Note.—Use one or more of the alternative statements.

FORM No. 50.

Proof of Personal Service of Citation.

STATE OF NEW YORK, }
 County of Saratoga. }

....., being duly sworn saith that he resides at and is over twenty-one years of age; that at the times and places hereinafter

stated he served the annexed citation upon the following persons therein named, to-wit:

On at County, N. Y., on the day of, 192., by delivering to and leaving with each of said persons a copy thereof. Deponent further saith that he knew the persons served as aforesaid to be the same persons mentioned and described in said citation and to whom the same was directed.

Sworn to before me this }
day of, 192.. }

.....
.....

FORM No. 51.

Proof of Personal Service of Citation.

SURROGATE'S COURT, County of New York.

In the matter of the application }
Deceased. }

STATE OF NEW YORK. }
County of, } ss.:

..... of, being duly sworn, says that he is over the age of eighteen; that he made due service of the within citation in the above-entitled special proceeding on the persons named below, whom deponent knew to be the persons mentioned and described in said citation, by delivering to and leaving with each of them a true copy of said citation as follows: On the day of, 192., on, at

(Jurat)

NOTE.—The original citation must be returned to the *Clerk of the Surrogates' Court* before 1 o'clock P. M. on the day preceding the return day, with proof of the due service or admission of service duly acknowledged.

FORM No. 52.**Affidavit of Inability to Make Personal Service, on which to Apply for Substituted Service.**

[§ 55, ¶ 27]

SURROGATE'S COURT, Rensselaer County.

In the matter of the	} of
.....	
.....	
Deceased.	

STATE OF NEW YORK, }
 Rensselaer County. } ss.:

N. F. W. being duly sworn says:

I. That he is managing clerk in the office of, attorney for the petitioner herein; that he is of full age and has been of full age since the issuance of the citation mentioned herein.

II. That deponent is a resident of the of, in the County of and State of New York, and is well acquainted with A. B., one of the parties to the foregoing proceeding; that the said A. B. is a resident of the said of, in the County of, in this State, and resides at No. street, and has a place of business at No., City of

III. That on or about the day of, 192., deponent received the citation, a copy of which is annexed hereto, for service on said A. B., and has made proper and diligent effort to serve same upon him. That deponent recently called at the residence of the said A. B., in the endeavor to serve said citation, without success (specify times).

IV. That deponent has been unable to find the said A. B. at his lodgings or at his place of business; that deponent has called frequently at each of the foregoing places but has been unable to find him; that the said A. B. no longer frequents his former resorts, either business or social, and has practically abandoned his lodgings; that he has no present business, or place of business, so far as deponent has been able to ascertain.

(Or thus:)

IV. That deponent, in an unsuccessful attempt to locate him, visited various places known to deponent to be frequented by the said A. B. (specify places and times). That at said A. B.'s residence he was told, by the person (name person, if known) answering his demand for admittance, that said A. B. was not at home and that the time of his return was unknown to said person, (or refused to give information in regard thereto, and could not, or would not, tell deponent where said A. B. could be found). That deponent has been unable to ascertain when the said A. B. will be at home, or where he now is, though deponent on the day of last, inquired of the said

A. B.'s wife at his residence aforesaid, and on the day of last, of, who resides in the house adjacent to that of the said A. B., and on the day of last, of, by whom the said A. B. was last employed. That deponent believes that the said A. B. is concealing himself and purposely avoiding deponent, in order to prevent service of citation in deponent's hands as aforesaid.

(Or thus:)

IV. That the said A. B. avoids service by refusing to permit deponent to see him (state mode of avoiding service, so as to show clearly the fact, thus:) At about o'clock .. m., on the day of, 19... deponent called at the office of said A. B., No. street, in the of, State and county aforesaid; said place being designated as the office of said A. B. in the city directory, or by sign over the door, etc.; that he found the person in attendance, who told him that he must state the nature of his business before he could see A. B. Thereupon deponent told him that he came to serve a citation on said A. B., and upon this statement the said person in attendance stated that deponent couldn't see him and refused to allow him to enter the inner office.

V. That deponent believes personal service cannot be made on the said defendant A. B., in the State of New York, although proper and diligent effort has been made, as herein shown.

VI. That no previous application for an order for substituted service has been made herein. (Or, if made, state what order or decision was made thereon, and what new facts, if any, are claimed to be shown.)

Sworn to before me this }
day of, 192.. }
.....

FORM No. 53.

Order for Substituted Service.

[§ 55, ¶ 27]

At a Surrogate's Court held in and for the County of
Rensselaer, at the Surrogate's Office, in the City of
Troy, in said County, on the day of,
192..

Present: Hon., Surrogate.

In the matter of }
..... of }
..... }
Deceased.

A citation having been duly issued in the above-entitled matter and satisfactory proof having been presented, by the affidavit of N. F. W., that the

said N. F. W., to whom the citation was delivered to be served upon A. B., has been unable to make such service, and that the said A. B. is a resident of this State and resides at No. street, in the of, in said County, and has an office or place of business at No., and that N. F. W. has made proper and diligent effort to serve said citation personally on said A. B. without success, the place of his sojourn being unknown to the said N. F. W. (or that he avoids service), so that personal service cannot be made upon him;

I do hereby order and direct that the service of citation herein upon said A. B. be made by leaving a copy thereof, and of this order, at the residence of said A. B. (designate residence) with a person of proper age, if upon reasonable application admittance can be obtained and such person found who will receive it. Or, failing to obtain admittance, or find such person, by affixing the same to the outer or other door of the said A. B.'s said place of business or office, or of his residence, and by depositing another copy of the said citation and this order properly inclosed in a post-paid wrapper, addressed to him, at his said place of business or principal office, or to him at his said place of residence, in the post office at the said place where he resides, or where said office, place of business or residence is located.

.....,

Surrogate.

Where the party to be served is a resident of the State but his specific place of residence cannot be ascertained, so that personal service cannot be made, there may be inserted in the order any such directions as to service as are acceptable to the Court and seem most likely to result in personal notice to the interested party, as by delivering a copy of the citation and this order to some person in charge of his office (street and number designated). Or, if reasonable application at said office, during ordinary business hours, fails to accomplish this result, then by affixing the same to the entrance door of said office. (Add provisions for mailing copy of citation and order to office address, hotel, former residence, as may be most satisfactory.)

The Court is given power to direct any method of service in case the defendant's residence cannot be found.

§ 55 Surrogate's Court Act.

FORM No. 54.

Affidavit of Substituted Service.

[§ 55, ¶ 27]

SURROGATE'S COURT, Rensselaer County.

In the matter of
 of

 Deceased.

STATE OF NEW YORK, }
 Rensselaer County. } ss.:

N. F. W. being duly sworn, says that he is years of age; that on the day of, 192.., at No. street, in the of, he served the annexed citation and order directing service thereof, as hereinafter specified, upon the said A. B., as in said order directed, to-wit, by leaving a copy of said citation and order at the residence of A. B., at No. street, in the of, in the County of, in this State, by there delivering to and leaving the same with, whom he knew to be the of said A. B. (Where the name of person to whom citation and order are delivered is unknown, it may be stated thus:) with a person at the door of A. B.'s residence, who opened said door in response to demand for admittance, and who appeared to be of proper age to receive such service, to-wit, over the age of fourteen, and who received the same. (If access cannot be obtained, then as follows:) by affixing a copy of said citation and order to the outer door of the residence of said A. B., at No. street, in the of, County of '....., in this State, deponent being unable, upon reasonable application, to obtain admittance, or to find any person of proper age at such residence who would receive the same; that said residence was closed and deponent was unable, by ringing and knocking, to find any person on the premises. (State whatever efforts were made to gain admittance and find a person on whom to make service.)

(Make similar statements if served or posted at office or place of business.)

That on the day of, 192.., at aforesaid (naming place of residence, or place of business, of person to be served) deponent deposited in the post office of said place another copy of said citation and order, properly inclosed in a post-paid wrapper, addressed to said A. B., at his said place of residence (or to his principal office or place of business).

Sworn to before me this }
 day of, 192.. }

.....,

.....

FORM No. 55.

Affidavit for Order to Open Safe Deposit Box.

SURROGATE'S COURT, County of New York.

In the matter of the application for a search
of a safe deposit box for the will of.....
Deceased.

STATE OF NEW YORK, }
County of New York. } ss.:

....., being duly sworn, says that is (of the will of), and resides at

That the said died at, on the day of, 192.., a resident of the County of New York. That the said deceased has a private safe in the vault of the Safe Deposit Company, a corporation doing business in the City of New York. That deponent believes that said deceased may have left a will in the said private safe and requests that an order be made directing the president or other officer of the said Safe Deposit Company, in the presence of a representative of the Comptroller of the State of New York, to examine the said safe for the purpose of ascertaining if a will of said deceased be deposited therein, and if such be found that the same be deposited in this Court.

.....,
Petitioner.

Dated,, 192..
(Verification as for a petition).

FORM No. 56.

Order to Open Safe Deposit Box.

At a Surrogate's Court held in and for the County of New York, at the Hall of Records in the Borough of Manhattan, City and County of New York, on the day of, 192..

Present: Honorable, Surrogate.

In the matter of the application for a search
of a safe deposit box for the will of
Deceased.

Upon reading and filing the petition of verified on the day of, 192.., the Safe Deposit Company of New York

is hereby ordered and directed and hereby authorized to allow
to open the private safe of, deceased, in the presence of the
president or other officer of the said Safe Deposit Company and a representa-
tive of the Comptroller of the State of New York, and examine the contents of
the said safe for the last will and testament of said deceased or any codicil
thereto, and without removing any other article therefrom, if said will or
codicil be found therein, the said Safe Deposit Company is hereby
ordered and directed forthwith to deposit the same in this Court.

.....,
Surrogate.

FORM No. 57.

Affidavit of Special Guardian.

SURROGATE'S COURT, County of New York.

In the matter of
of.
Deceased.

County of New York, ss.:

....., being duly sworn, says: That he is an attorney and
counselor-at-law; that he is fully competent to protect the rights of the infants
for whom he has consented in writing to act as special guardian in this proceed-
ing; that he has no interest adverse to said infants therein, and that he is not
connected in business with the attorney or counsel of any adverse party thereto.

Sworn to before me this
day of, 192..

FORM No. 58.

Consent and Affidavit of Special Guardian.

[§ 64, ¶ 30]

SURROGATE'S COURT, Albany County.

In the matter of
of.
Deceased.

I,, of the of, County of and
State of New York, counselor-at-law, hereby do consent to become the Special

Guardian of, infant..., interested in the above-entitled proceeding, for sole purpose of appearing for and protecting interest in said proceeding.

Dated this day of, 192..
STATE OF NEW YORK, }
County of Albany, } ss.:
On this day of, 192..., before me personally came, to me known to be the person described in and who executed the foregoing consent, and acknowledged the execution thereof.

STATE OF NEW YORK, }
County of Albany, }
I,, do swear that I am an attorney of the Courts of Record of the State of New York; that I am the person who has consented to become the Special Guardian of the above-named infant.. in the above-entitled proceeding, and believe I am fully competent to understand and protect the rights of said infant.. in said proceeding; that I have no interest adverse to said infant.. interests, and am not connected in business with the attorney or counsel for any of the adverse parties to said proceeding, and that I am of sufficient ability to answer to said infant... for any damages which may sustain by my negligence or misconduct in the defense or prosecution of the above-entitled proceeding.

Sworn to before me this }
day of, 192.. }
.....,
.....

FORM No. 59.

Report of Special Guardian.

[§ 64, ¶ 30]

SURROGATE'S COURT, Albany County.

In the matter of the petition of..... }
for }
of }

City and County of Albany, {
STATE OF NEW YORK, } ss.:
..... being duly sworn says that he is an attorney and counselor-at-law, residing and having his office as such in the of,

County of Albany, N. Y.; that since his appointment and qualification as Special Guardian of herein, he has to the best of his ability made himself acquainted with the rights and interests of his said ward.....; that he has taken all proceedings necessary, desirable or expedient for the protection of such rights and interests to the best of his knowledge and as he believes; that he has carefully examined all papers filed herein and into the circumstances of the case; that he has attended all hearings and considered the testimony given; that he has found no objection to, and that the proposed decree submitted therefor is in all respects satisfactory and proper.

Sworn to before me this }
 day of, 192.. }

.....,
 Surrogate.

FORM No. 60.

Renunciation of Executor.

[§ 2628, ¶ 78]

In the matter of the last will and testament
 of
 Deceased.

I, of the of, one of the executors named and appointed in and by the last will and testament of, late of, dated the day of, 19..., do hereby renounce the said appointment, and all right and claim to letters testamentary on the said last will and testament, or to act as executor thereof.

Dated,, 192..

(Acknowledgment.)

FORM No. 61.

Executors, Renunciation and Waiver.

[§ 158, ¶ 78]

SURROGATE'S COURT, County of Bronx.

In the matter of proving the last will and tes-
 of
 Deceased.

I,, named as execut... in the last will and testament of deceased, dated the day of, 191..., do

hereby renounce said appointment and all right to letters testamentary on the estate of said deceased or to act as execut.... under said will, and I do hereby appear in person and waive the issue and service of a citation in the above-entitled matter, and consent that said instrument be forthwith admitted to probate.

Dated,, 191..

Signed in the presence of

.....

(Acknowledgment.)

STATE OF NEW YORK, }

County of, }

I,, Clerk of the County of (and also Clerk of the, the same being a court of record of the aforesaid county, having by law a seal) do hereby certify that, Esquire, whose name is subscribed to the attached certificate of acknowledgment, proof or affidavit, was at the time of taking said acknowledgment, proof or affidavit, a duly commissioned and sworn and residing in said county, and was, as such, an officer of said state, duly authorized by the laws thereof, to take and certify the same, as well as to take and certify the proof and acknowledgment of deeds and other instruments in writing to be recorded in said state, and that full faith and credit are and ought to be given to his official acts; and I further certify that I am well acquainted with his handwriting, and verily believe that the signature to the attached certificate is his genuine signature.

In Witness Whereof, I have hereunto set my hand and affixed my official [L. S.] seal this day of, 191..

FORM No. 62.

Petition for Probate.

[§§ 51, 139, ¶¶ 25, 44]

SURROGATE'S COURT, County of New York.

In the matter of proving the last will and testament of
 Deceased,
 as a will of real and personal property.

To the Surrogate's Court of the County of New York:

The petition of, residing at No...., in the Borough of, City of New York, respectfully states:

That your petitioner.,, execut... named in the last will and testament of, late of the County of New York, deceased;

That said last will and testament, herewith presented and hereby offered for probate, relates to both real and personal property, and bears date the day of, 19..., and is signed at the end thereof by the said testa.... and by....., as subscribing witnesses.

That petitioner does not know of any codicil to said last will and testament, nor is there any to the best of h.. information and belief.

(The petition shall describe any other wills of the same testator on file in the Surrogate's office of New York County.)

That the said deceased was, at the time of h... death, a resident of the County of New York,, and departed this life in said county on the day of, 19..

That the ^{husband}widow , all the heirs, and all the next of kin of said testator, each person designated in the will herewith presented and hereby offered for probate as executor, testamentary trustee or guardian; and their residences and post-office addresses are hereinafter mentioned in subdivisions a, b, c and d hereof, as follows:

a. The following named persons who are of full age and of sound mind:
..... a of deceased
who resides at
..... a of deceased
who resides at

(If any person or his name, residence and post office address be unknown, the petition must substantially set forth the *facts* which show what efforts have been made to ascertain the same and a general description of the person, showing his connection with the decedent and his interest in the matter.

If there is any will of the same testator on file in the Surrogate's office, other than the one propounded, set forth the names and post office addresses of the devisees, legatees and beneficiaries therein named, and the names and post office addresses of the persons designated therein as executors, testamentary trustees or guardians.)

b. The following named persons who are infants over fourteen years of age:
..... a of deceased
who resides at
..... a of deceased
who resides at

c. The following named persons who are infants under fourteen years of age:
..... a of deceased
who resides at
..... a of deceased
who resides at

(State whether or not the infant has general or testamentary guardian, whether or not his father, or, if he be dead, his mother, is living, giving the name and

post office address of such person, and the name and post office address of the person with whom such infant resides. Section 51.)

d. The following named persons who are of full age but of unsound mind:
 a of deceased
 who resides at
 a of deceased
 who resides at

(State the name and post office address of the committee, if any, and the name and post office address of the person or institution having the care or custody of the incompetent; also the facts regarding his incompetency and the name and post office address of a relative or friend having an interest in his welfare. Section 51.)

That the value of the real property in this State of which the testator died seized is dollars and that the value of the personal property of which said testator died possessed is dollars.

That said testator left h.... surviving no ^{husband,} widow, child or children, no adopted child or children, no issue of any deceased child or children, no issue of any deceased adopted child or children, no father or mother, no brother or sister of the half or the whole blood, no issue of any deceased brother or sister, no uncle, no aunt, and no issue of any deceased uncle or aunt, except those hereinbefore mentioned.

That no petition for the probate of the will herewith presented and hereby offered for probate, or for letters of administration on said estate, has been heretofore filed in this or any other Surrogate's Court of this State.

That there is no person designated in the will herewith presented and hereby offered for probate as executor, testamentary trustee or guardian, except as hereinbefore mentioned.

That there is no person named as executor, testamentary trustee, guardian, devisee, legatee or beneficiary in any other will of the same testator filed in the Surrogate's office of the County of New York.

That the names and post office addresses of the devisees, legatees and other beneficiaries named in the will herewith presented and hereby offered for probate, are as follows:

1. The following named legatees, etc., have been hereinbefore mentioned:	
Name of legatee, devisee or beneficiary	Post-office address
.....
.....
.....

2. The following named legatees, etc., have not been hereinbefore mentioned:	
Name of legatee, devisee or beneficiary	Post-office address
.....
.....

That there are no persons interested in this proceeding other than those hereinbefore mentioned.

(If an executor, or trustee, is required by the will to hold, manage, or invest, property for the benefit of another, he must execute a bond. Code Section 169.)

Wherefore your petitioner prays:

That a citation to show cause issue herein to the persons hereinbefore named, described and included in subdivisions a, b, c and d hereof, citing them to show cause why the last will and testament herewith presented and hereby offered for probate should not be admitted to probate;

That an order be granted directing the service of the citation personally without the State or by publication upon the persons hereinbefore named, described and included in subdivisions a, b, c and d hereof who are not residents of the State of New York, and also upon the persons hereinbefore described and included in those subdivisions who and whose names or residences and post office addresses are unknown and cannot be ascertained; and

That the last will and testament herewith presented and hereby offered for probate may be admitted to probate as a will of real and personal property and that letters testamentary may be issued to the execu.... who may qualify thereunder.

Dated, New York,, 192..

.....,
Petitioner.

(Add verification.)

(When all parties waive citation all papers must be filed two days before the day fixed for the hearing. Rule 4, N. Y. Co.)

FORM No. 63.

Petition for Probate.

[§§ 51, 139, ¶¶ 25, 44]

SURROGATE'S COURT, County of

In the matter of the petition of
for the
of }

To the Surrogate's Court, of the County of Cayuga:

The petition of, residing in, County of, and State of New York, respectfully shows:

That, late of the of, in the County of Cayuga aforesaid, died on the day of, in the year of our Lord, one thousand nine hundred

The said deceased was at the time of death a resident of the of, in the County of Cayuga:

Said deceased left a last will and testament, which is dated the day of, in the year of our Lord, one thousand nine hundred and (and a codicil thereto dated the day of, 19...).

Your petitioner is the execut.... named in said will. The said deceased left his widow (her husband), residing at, State of New York. The following named persons are the only heirs-at-law and next of kin of said deceased, and their degree of relationship to the said deceased, their places of residence and post office addresses are respectively as follows, viz.:

..... a, who resides at, State of

The names and post office addresses of the legatees, devisees, executors, trustees and testamentary guardians other than the persons named above and who are not heirs-at-law or next of kin of said deceased, are as follows:

..... a, who resides at, State of

..... a, who resides at, State of

That there is no other will of the same testator filed in the Surrogate's office of Cayuga County.

That there are no other persons than those mentioned interested in this application or proceeding.

That all the above-named persons are of full age and sound mind, except the following are infants of the ages respectively as following, viz.:.....

That the names and post office addresses of the father and mother of said infants, and of the persons with whom they reside, or are employed, and of their guardians, if any, are as follows:

That the will relates to both real and personal estate, and as your petitioner is are) informed and believe, the value of the personal property does not exceed \$....., and that said deceased left real estate not exceeding in value the sum of \$.....

That no previous petition for the probate of said will, or for a grant of letters testamentary, or of administration of the personal property of the decedent, has been filed or presented in any court to the knowledge or belief of your petitioner.

Wherefore your petitioner.. pray.. that said last will and testament may be proved, that the same may be recorded and letters testamentary be granted thereon in pursuance of the statute in such cases made and provided; that said widow (husband), heirs-at-law and next of kin be cited to show cause why said last will and testament should not be admitted to probate.

And your petitioner further prays for an order directing service of a citation herein without the State of New York or by publication upon the persons and corporations named herein as nonresidents, or who, or whose residence, are unknown, and upon the persons and corporations named herein as residents who it is shown cannot be served within the State of New York.

Dated the day of, 192..

.....
(Petitioner's signature.)

(Add verification and oath of office.)

FORM No. 64.

Affidavit under Transfer Tax Law to be Filed with Petition.

KINGS COUNTY, SURROGATE'S COURT.

In the matter of the petition of
to prove the last will and testament of
late of the County of Kings, Deceased.

County of Kings, ss.:

....., being duly sworn, says that ..he is the petitioner herein.
That the above-named decedent was at the time of death a resident
of, and died on the day of, 192..

That the estimated value of the real property in this State of which said
decedent died seized is dollars.

That the value of personal property, wherever situate, of which said decedent
died possessed does not exceed dollars.

That said decedent did not during lifetime make any
transfer of property by deed, grant, bargain, sale or gift, in contemplation of
..... death, or intended to take effect in possession or enjoyment at or
after death.

That the following is a statement of the names and places of residence of
all persons entitled to any portion of the estate of said decedent, and the
relationship of such persons to said decedent.

Name.	Amount of Legacy.	Residence.	Relationship.
.....
.....
.....

Sworn to before me, this }
day of, 192.. }

.....,
Notary Public, Kings County.

FORM No. 65.**Affidavit to Copy of Will.**

[Required in Bronx, New York, and other counties to be filed if original will is not filed with petition.]

SURROGATE'S COURT, County of Bronx.

In the matter of proving the last will and testament of <div style="text-align: right;">Deceased.</div>	}
---	---

STATE OF NEW YORK. County of Bronx,	} ss.:
--	--------

We, and, being duly and severally sworn, say, each forself, that ..he has carefully compared the foregoing paper with the original thereof, dated the day of, 19.., about to be filed for probate and that the same in all respects a true and correct copy of said instrument and of the whole thereof.

.....

Sworn to before me this day of, 192..	}
---	---

.....

FORM No. 66.**Waiver of Citation for Probate.**

SURROGATE'S COURT, County of New York.

In the matter of proving the last will and testament of <div style="text-align: right;">Deceased,</div> as a will of real and personal property.	}
--	---

To the Surrogate's Court of the County of New York:

I, the undersigned, an heir of and next of kin of, deceased, do hereby appear in person and waive

the issue and service of a citation in the matter of proving the last will and testament of said deceased, bearing date, 19..

Dated,, 192..

.....
.....

Signed in the presence of

.....
.....

STATE OF, }
County of, } ss.:

Be it known, that on the day of, one thousand nine hundred and twenty, before me a in and for the State of, duly commissioned and sworn, residing in the personally came and appeared to me personally known, and known to me to be the same person described in and who executed the above waiver, and acknowledged the same to be act and deed.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, the day and year last above written.

.....
.....

NOTE.—Outside the State of New York a certificate must be procured from the County Clerk of the *county in which the officer taking the acknowledgment resides*. This certificate must show the officer taking the acknowledgment is an officer of the State where it is taken, and is authorized by the laws thereof to *take the acknowledgment of deeds to be recorded therein*; the said Clerk is well acquainted with such officers handwriting, and believes the signature to the original certificate is genuine.

See Form No. 7.

FORM No. 67.

Waiver of Issue and Service of Citation and Authority to Enter Appearance.

[§ 41, ¶ 20]

SURROGATE'S COURT, County of Rensselaer.

In the matter of proving the last will and testament of }
Deceased. }

The undersigned, heirs-at-law, next of kin of of said deceased hereby waive the issue and service of the usual citation required by law in this matter, and do hereby consent that the last will and testa-

ment of the said, deceased, dated the day of , 19 .., may be proved and admitted to probate, before and by the Surrogates' Court of Rensselaer County, at the City of Troy, in the State of New York, without further notice, whenever offered for that purpose; and we do hereby appear in such proceeding and authorize our appearances to be entered on the record.

Sealed with our seals and dated this day of, 192..

.....

(Add acknowledgment and certificate. See Form No. 66.)

FORM No. 68.

Citation for Probate.

[§ 140, ¶¶ 26, 45]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God Free and Independent, Send Greeting:

To, the heirs and next of kin of, deceased.

Whereas,, who resides at, the City of New York, has lately applied to the Surrogate's Court of our County of New York, to have a certain instrument in writing, dated the day of, 19..., relating to both real and personal property, duly proved as the last will and testament of, who was at the time of his death a resident of, the County of New York, deceased.

Therefore, you and each of you are cited to show cause before the Surrogates' Court of our County of New York, at the Hall of Records, in the County of New York, on the day of, one thousand nine hundred and twenty at half past ten o'clock in the forenoon of that day, why the said will and testament should not be admitted to probate as a will or real and personal property.

In testimony whereof, we have caused the seal of the Surrogate's Court of the County of New York to be hereunto affixed.

Witness, Hon., a Surrogate of our said County of New York,
 [L. S.] at said county, the day of, in the year of our Lord one thousand nine hundred and twenty-.....

.....,

Clerk of the Surrogate's Court.

NOTE.—The original citation must be returned to the Probate Clerk before one o'clock p. m. on the day preceding the return day, with sworn proof of service.

early 50's; that they understood from him that his father, mother and all other relatives were dead except a niece of whom they heard him talk who was in some place in Germany, but as they learned from him she died several years before he died; that when he spoke of said niece he spoke of her as a person who had never married. These deponents are informed and verily believe that said left no heir-at-law or next of kin him surviving; that they have made diligent inquiry and effort to ascertain whether there was any such next of kin or heirs-at-law and have been unable after such inquiry and effort to ascertain that he left any such persons him surviving, and they have also made diligent inquiry and effort to ascertain the place or places where any such heirs-at-law or next of kin would probably receive matters transmitted through post office and they are unable with reasonable diligence to ascertain the same. Since the death of said, no persons claiming to be next of kin or heirs-at-law of said have appeared or made claim to any of his estate or property in Troy, although he was the owner of real property in said city at the time of his death.

.....

Sworn to before me this }
 day of, 192.. }

William C. Roche,

Notary Public, Rensselaer County, N. Y.

FORM No. 70.

Affidavit Concerning Unknown Heirs-at-Law and Next of Kin.

[§ 57, ¶ 28]

SURROGATE'S COURT, Rensselaer County.

In the matter of the probate of the last will
 and testament of, late of the
 City of Troy, N. Y.

Deceased.

STATE OF NEW YORK, }

Rensselaer County. }

ss.:

....., being duly sworn, says she resides at No. 200 Tenth street, in the City of Troy, in the County of Rensselaer, N. Y. That your petitioner is the executrix named in the last will and testament of, late of Troy, N. Y., deceased. That said left surviving a widow whose name is Alice J. Pedro, who resides at Troy, N. Y. That deponent alleges on information and belief that there was a William Jesup, brother of Caroline Pedro, deceased, mother of testator; that he is dead, but whether he left any widow or descendants she is unable to state.

Petitioner further alleges that the father of said was named Joseph, but she is unable to state whether or not he is living but believes him to be dead and she is unable to state whether or not he left a widow or descendants other than said, who was the second husband of your petitioner.

Your petitioner further alleges that she has made diligent effort to find the heirs-at-law and next of kin of said; that she hereby refers to the affidavit of her attorney, Calvin S. McChesney, verified the day of, 192..., hereto annexed as a part of her petition; that immediately after the death of said she placed his will in the hands of said attorney and directed him to proceed to take the necessary steps to have the same admitted to probate and told him what she knew about the relatives of her said deceased husband and that his said affidavit hereto annexed shows the correspondence had and the search made by her attorney for the said heirs-at-law and next of kin.

She also refers to the letters and copies of letters annexed to said affidavit of her attorney as part of this affidavit.

[Jurat.]

FORM No. 71.

Order for Service of Citation on Unknown Parties by Publication.

[§§ 140, 58, ¶¶ 45, 28]

At Chambers of a Surrogate's Court held in and for the County of New York, at the Surrogate's Office in the Borough of Manhattan, in the City of New York, on the day of, in the year nineteen hundred and twenty-.....

Present: Hon., Surrogate.

In the matter of proving the last will and testament of,	}
Deceased,	
as a will of real and personal property.	

Upon filing the verified petition of, executor named in the last will and testament of late of, deceased, by which the petitioner has made proof to my satisfaction that there are heirs and next of kin of said deceased, whose names and places of residence are unknown, and cannot after diligent inquiry be ascertained by the petitioner herein; and also that there may be other heirs and next of kin of said deceased, who and whose names and places of residence are unknown and cannot after diligent inquiry be ascertained by the petitioner herein;

Now, On motion of, attorney for said, petitioner,

Ordered, That service of citation in the above-entitled matter upon those persons who and whose names and places of residence are unknown, and cannot after diligent inquiry be ascertained by, the petitioner herein, be made by publication thereof in two newspapers, to wit, the New York Law Journal and in the, both published in the County of New York, once a week for four successive weeks; and I being satisfied by the said petition that the petitioner cannot with reasonable diligence ascertain a place or places where the said heirs and next of kin would probably receive matter transmitted through the post office, hereby dispense with the deposit of any papers therein addressed to them.

.....
Surrogate.

FORM No. 72.

Order for Service of Citation Personally without the State or by Publication.

[§§ 140, 58, ¶¶ 45, 28]

At Chambers of a Surrogate's Court held in and for the
County of New York, in the City of New York, on the
.... day of in the year nineteen hun-
dred and twenty-.....

Present: Hon., Surrogate.

<p>In the matter of proving the last will and testament of, Deceased, as a will of real and personal property.</p>
--

Upon filing the verified petition of, executor named in the last will and testament of late of, deceased, by which the petitioner has made proof to my satisfaction that the persons hereinafter named are heirs and next of kin of said, deceased, and are not residents of this State, and that personal service of the citation herein cannot with due diligence be made upon within the State;

Now, on motion of, attorney for the said petitioner

Ordered, That the service of the citation in the above-entitled matter upon all persons hereinafter named be made by publication thereof in two newspapers, to wit, in the New York Law Journal and in the both published in the County of New York, once a week for four successive

weeks; or, at the option of the petitioner, by delivering to and leaving with each of the persons hereinafter named in person a true copy of the citation without the State.

And it is further ordered and directed, That on or before the day of the first publication, the petitioner deposit in the post office at the County of New York, a copy of the citation, contained in a securely closed post paid wrapper directed to each of the following persons, respectively, at place.. designated below:
 residing at

Surrogate.

FORM No. 73.

Order for Personal Service Without the State.

At Chambers of a Surrogate's Court held in and for the County of New York, at the Surrogate's Office in the Borough of Manhattan in the City of New York, on the day of, in the year nineteen hundred and twenty-.....

Present: Honorable, Surrogate.

In the matter of proving the last will and testament of,	}
Deceased,	
as a will of real and personal property.	

Upon filing the verified petition of, executor named in the last will and testament of, late of, deceased, by which the petitioner has made proof to my satisfaction that (insert names and residences) are heir.. and next of kin of said, deceased, and are notresident.. of this State, and that personal service of the citation herein cannot with due diligence be made upon within the State;

Now, on motion of, attorney for the said petitioner,

Ordered, That the service of the citation in the above-entitled matter upon the aforesaid persons be made by delivering to and leaving with each of them in person a true copy of the citation without the State.

.....,
 Surrogate.

NOTE.—Where parties are infants under 14, provide that, *in addition* to the copies delivered to such infants personally, further copies, *one on behalf of each* of such infants, shall be delivered to the person with whom they sojourn.

FORM No. 74.

General Order for Publication or Service Without the State.

[§§ 140, 58, ¶¶ 45, 28]

At Chambers of a Surrogates' Court held in and for the
County of New York, at the Surrogates' Office in the
Borough of Manhattan, in the City of New York, on
the day of in the year nineteen
hundred and twenty-.....

Present: Hon., Surrogate.

<p>In the matter of proving the last will and testament of, Deceased, as a will of real and personal property.</p>	}
--	---

Upon filing the verified petition of, executor named in the last will and testament of, late of, deceased, by which the petitioner has made proof to my satisfaction that the persons whose names and places of residence are hereinafter stated are heir.. and next of kin of said, deceased, and are not resident.. of this State, and that personal service of the citation herein cannot with due diligence be made upon within the State; and by which said petition the petitioner has also made proof to my satisfaction that there are other heirs and next of kin of said deceased, whose names and places of residence are unknown, and cannot after diligent inquiry be ascertained by, the petitioner herein, and also that heir.. and next of kin of said deceased, and that place of residence are unknown and cannot after diligent inquiry be ascertained by, the petitioner herein.

Now, on motion of, attorney for said, petitioner,

Ordered, That the service of the citation in the above entitled matter upon the persons whose names and places of residence are hereinafter stated and also upon those persons whose names and places of residence are unknown, and cannot after diligent inquiry be ascertained by, the petitioner herein, and also upon whose place of residence unknown, and cannot after diligent inquiry be ascertained by, the petitioner herein, be made by publication thereof in two newspapers, to wit, in the New York Law Journal and in the, both published in the County of New York, once a week for four successive weeks; or, at the option of the petitioner, by delivering to and leaving with each of them in person, a true copy of the citation without the State:

.....
and I being satisfied by the said petition that the petitioner cannot with

reasonable diligence ascertain a place or places where the said heirs and next of kin whose names or residences are unknown would probably receive matter transmitted through the postoffice, hereby dispense with the deposit of any papers therein addressed to them.

And it is further ordered and directed, That on or before the day of the first publication, the petitioner deposit in the postoffice, at the County of New York, a copy of the citation, contained in a securely closed post paid wrapper, directed to each of the following persons, respectively, at the place designated below,

.....,
Surrogate.

FORM No. 75.

Order for Service of Unknown Parties.

At Chambers of a Surrogate's Court held in and for the County of Bronx, at the Surrogate's Office in the Borough of The Bronx in the City of New York, on the day of in the year nineteen hundred and twenty-.....

Present: Hon., Surrogate.

In the matter of proving the last will and testament of,	}
Deceased,	
as a will of real and personal property.	

Upon filing the verified petition of, executor named in the last will and Testament of, late of, deceased, by which the petitioner has set forth to my satisfaction the facts which show that the persons whose names and places of residence are hereinafter stated are heir.. and next of kin of said, deceased, or are entitled to citation herein, and are not resident.. of this State, and that personal service of the citation herein cannot with due diligence be made upon within the State; and by which said petition the petitioner has also set forth to my satisfaction the facts which show that if living, heir.. and next of kin of said deceased, and that place.. of residence and post-office address.. are unknown and cannot after diligent inquiry be ascertained by, the petitioner herein, and if the said be dead, husband, wife, if any, heirs at law, next of kin and successors in interest, are heirs at law and next of kin of said, deceased, or entitled to citation herein, and that their names, residences and post-office addresses are unknown and cannot after diligent inquiry be ascertained by the petitioner herein; and by which said petition the petitioner has also set forth to my satisfaction the facts which

show that there are other heirs and next of kin of said deceased, whose names, post-office addresses and places of residence are unknown, and cannot after diligent inquiry be ascertained by, the petitioner herein, and that the petitioner has used due diligence to ascertain the names and post-office addresses of the parties whose names or post-office addresses are unknown,

Now, on motion of, attorney for the said, petitioner,

Ordered, That the service of the citation in the above-entitled matter upon the persons whose names and places of residence are hereinafter stated and also upon those persons whose names, post-office address and places of residence are unknown, and cannot after diligent inquiry be ascertained by, the petitioner herein, and also upon, if living, whose place of residence and post-office address.. unknown, and cannot after diligent inquiry be ascertained by, the petitioner herein, be made by publication thereof in two newspapers, to wit, in the New York Law Journal and in the, both published in the County of Bronx, once a week for four successive weeks; or at the option of the petitioner, by delivering to and leaving with each of them in person, a true copy of the citation without the State, in the manner prescribed by sections 55, 58 and 59 of the Surrogate's Court Act:

.....(Insert names and addresses).....
and I being satisfied by the said petition that the petitioner cannot with reasonable diligence ascertain a place or places where the said heirs, next of kin or persons entitled to citation herein, whose names or residences are unknown, would probably receive matter transmitted through the post-office, hereby dispense with the deposit of any papers therein addressed to them.

And it is further ordered and directed, That on or before the day of the first publication, the petitioner deposit in the branch post-office, in the County of Bronx, known as Station R, at 378 East 149th Street in said county, a copy of the citation, contained in a securely closed post-paid wrapper, directed to each of the following persons, respectively at the place.. designated below:

.....
.....,
Surrogate.

FORM No. 76.**Order for Publication Against Unknown Persons.**

[§ 58, ¶ 28]

At a Surrogate's Court, held in and for the County of
Rensselaer, at the Surrogate's Office in the City of
Troy, N. Y., on the day of, 19..

Present: Hon., Surrogate.

<p>In the matter of proving the last will and testament of</p> <p style="text-align: right;">Deceased.</p>
--

On reading and filing the petition, duly verified, of, executrix named in the will of, late of the City of Troy, in the said county, deceased, praying that a citation may issue out of this court directed to the heirs-at-law and next of kin of deceased for the probate of said last will and testament and it appearing satisfactorily to the Surrogate that..... are heirs-at-law of said testator and that they are non-residents of this State and that personal service of the citation herein cannot with due diligence be made upon them within the State, and by which said petition the said petitioner has also made proof to my satisfaction that the widow, if any, and the heirs-at-law of William Jessup, deceased, are interested in the estate of said testator and that their names and residences are unknown to petitioner and cannot after diligent inquiry be ascertained, and that Joseph Pedro, if living, is an heir-at-law and next of kin of said testator and that his widow and heirs-at-law, if he be dead, are interested in the estate of said testator, and that the fact whether he be living or dead, his residence, if living, and the names and places of residence of his widow and heirs-at-law and next of kin are unknown to petitioner and cannot after diligent inquiry be ascertained; and a citation having been issued to said persons and also to all other persons, heirs-at-law and next of kin of, late of the City of Troy, in the County of Rensselaer, deceased, whose names and places of residence are unknown and cannot with due diligence be ascertained.

Now, on motion of Calvin S. McChesney, attorney for petitioner, it is

Ordered, That service of the said citation in the above-entitled matter upon said, and also upon the widow, if any, and the heirs-at-law of William Jessup, deceased, and also upon Joseph Pedro, if living, or his widow, if any, and his heirs-at-law and next of kin, if he be dead; and also upon all other persons heirs-at-law and next of kin of, late of the City of Troy, in the County of Rensselaer, deceased, whose names and places of residence are unknown and cannot with due dili-

gence be ascertained be made by publication thereof in, etc. (Continue as in usual order, and then insert order dispensing with mailing as follows).

And it appearing to the satisfaction of the Surrogate from the petition and affidavit in this matter that the place or places where said would probably receive matter transmitted through the post-office unknown and cannot with reasonable diligence be ascertained, it is ordered, that the deposit of a copy of said citation in the post-office addressed to said be and the same is hereby dispensed with.

.....,
Surrogate.

FORM No. 77.

Order for Service by Publication or Without the State—Parties Known.

[§ 58, ¶ 28]

At a Surrogate's Court, held in and for the County of Rensselaer, at the Surrogate's Office in the City of Troy in said county, on the day of, 192..

Present: Hon., Surrogate.

In the matter of proving the last will and testament of	}
Deceased.	

On reading and filing the petition, duly verified, of execut.... named in the last will and testament of said late of the of in said county, deceased, praying that a citation may issue out of this court, directed to the heirs-at-law and next of kin of said deceased, for the probate of said last will and testament, and it appearing satisfactorily to the surrogate that are executors named in said will, heirs-at-law, and next of kin of said deceased, and that they severally reside out of the State of New York, and reside at the following named places to wit:

..... and that personal service of the citation herein cannot, with due diligence, be made upon such persons within the State; and a citation having been issued, returnable on the day of, 192.., at 10 o'clock, a. m., it is ordered, that the said citation be served on said by the publication thereof in two newspapers, to wit, in the and the

....., both published in the county of Rensselaer, once in each of four successive weeks, and on or before the day of the first publication of said citation by depositing in the post-office at a copy of said citation, contained in a securely closed post-paid wrapper, directed to each person to be served as above named at the place herein above specified;

And that if any such person be an infant under the age of 14 years, a further copy likewise contained in a securely closed post-paid wrapper directed to the father, or mother, or guardian, and to the person with whom such infant is sojourning; or at the option of the petitioner by serving said citation personally without the State in the manner prescribed by law for the personal service thereof within the State.

.....,
Surrogate.

FORM No. 78.

Description in Citation of Classes of Persons for Identification.

Insert in usual citation statements similar to the following:

Phillip Nash, a cousin of the Testatrix Emeline M. McChesney, deceased, and a son of Mary Dater Nash, deceased, whose place of residence and post-office address is unknown and cannot with due diligence be ascertained; Frank Childs, a cousin of the Testatrix Emeline M. McChesney, deceased, and a son of the sister of the mother of said Testatrix, whose place of residence and post-office address is unknown, and cannot with due diligence be ascertained, and all other heirs-at-law and next of kin of said Emeline M. McChesney, deceased, if any there be, being the descendants, heirs-at-law and next of kin of the deceased brothers and sisters of Joseph B. McChesney, the deceased father of said Emeline M. McChesney, deceased, whose names, residences and post-office addresses are unknown and cannot with due diligence be ascertained, and the descendants, heirs at law and next of kin of the deceased brothers and sisters of the deceased mother of said Emeline M. McChesney, deceased, whose names, residences and post-office addresses are unknown and cannot with due diligence be ascertained, and if any of the above described unknown heirs-at-law and next of kin, if any there be, have died subsequently to the death of said Testatrix Emeline M. McChesney, deceased, then to their heirs-at-law, next of kin, husbands, or widows, executors, administrators, devisees, legatees, assignees, and successors in interest, if any there be, of all such persons whose names, places of residence and post-office addresses are unknown and cannot with due diligence be ascertained, the heirs-at-law and next of kin of said Emeline M. McChesney, deceased:

Upon the petition of, etc. (continue in usual form).

FORM No. 79.**Order for Additional Service on Infant.**

[§ 60, ¶ 27]

At Chambers of the Surrogates' Court in and for the
County of New York, held at the Hall of Records, in
the County of New York, on the day of
..... in the year nineteen hundred and twenty-
.....

Present: Hon., Surrogate.

In the matter of proving the last will and
testament of

Deceased,

As a will of real and personal property.

An application having been made by to a Surrogate of the
County of New York to have a certain paper writing proved as the will of
....., late of the County of New York, deceased, and it appearing by
h.... petition that of the persons to be cited
infant.. under the age of fourteen years.

It is Ordered, That a copy of the citation herein be also delivered to and left
with, Esq., counselor-at-law, of the City of New York, in behalf of
said infant.. at least eight days before the return day of said citation, and that
the service of said citation shall not be deemed complete until such delivery.

.....,

Surrogate.

FORM No. 80.**Report of Special Guardian.**

[§ 64, ¶ 30]

SURROGATE'S COURT, County of Bronx.

In the matter of proving the last will and
testament of

Deceased,

As a will of real and personal property.

STATE OF NEW YORK, }
County of Bronx, } ss.:

....., being duly sworn, says that he is a counselor-at-law; that
since the filing of his consent to act herein and since his appointment as Special

Guardian herein, he has to the best of his ability made himself acquainted with the rights of his ward., and that he has taken all the steps necessary for the protection of such rights, to the best of his knowledge and as he believes; that he has examined into the circumstances of the case, the instrument offered for probate, the petition and other papers herein; that he has attended on the return of the citation and examined the testimony given by the subscribing witnesses, and that he has found no objections to the probate of said instrument, and that it appears to be for the best interest of his ward.. that the same should be admitted to probate.

Sworn to before me this..... }
 day of, 192.. }

.....,
 Special Guardian.

FORM No. 81.

Petition for Leave to Intervene on Probate.

[¶ 46]

SURROGATE'S COURT, County of Rensselaer.

In the matter of the probate of the last will and testament of <div style="text-align: right;">Deceased.</div>
--

To the Surrogate's Court of the County of Rensselaer:

The petition of A. B., residing in, in the County of, and State of, respectfully shows: That a petition for the probate of the alleged last will and testament of, late of the town of, in the County of Rensselaer, deceased, was filed in this court on the day of, 192..; that said petition purports to name all of the heirs-at-law and next of kin of the said deceased; that it does not name or refer to your petitioner as one of such heirs-at-law and next of kin; that your petitioner is one of the heirs-at-law and next of kin of the said deceased by reason of the following facts. (Here state the facts which show the relationship of the petitioner to the deceased.)

That by reason of the foregoing facts your petitioner is interested in the estate of the said deceased and is entitled to appear and be a party to the said probate proceeding.

Wherefore, your petitioner prays that an order of this court be made permitting him to intervene and make himself a party to such proceeding.

Dated,

(Verification.)

NOTE.—This petition suggests the form of petition to be used in any proceeding when a person desires to intervene.

A notice of motion would be a simpler method of obtaining this relief.

FORM No. 82.

Order Permitting Interested Person to Intervene and Make Himself a Party to a Proceeding for Probate.

[¶ 46]

At a Surrogate's Court, held in and for the County of Rensselaer, at the Surrogate's office, in the Court House, at the City of Troy, N. Y., on the day of, 192...

Present: Hon., Surrogate.

In the matter of the probate of the last will
and testament of
Deceased.

On the petition of A. B., filed in this court on the day of, 192.,, alleging that he is an heir-at-law and next of kin of, deceased, and praying that he may be allowed to intervene and become a party to the probate of the alleged last will and testament of the said deceased in the proceeding now pending in this court for such purpose, and upon the proofs made by him upon such application; and after hearing, attorney for such petitioner, and, in opposition thereto (if any opposition be made).

Ordered, that A. B., having shown himself to be a person interested in this proceeding, be and he hereby is allowed to intervene and make himself a party to this proceeding as though named in the petition and in the citation in this matter.

.....

Surrogate.

FORM No. 83.

Affidavit of Witness Upon Which Order is Based to Take Testimony Before Another Surrogate.

[§ 74, ¶ 32]

SURROGATE'S COURT, County of

In the matter of.....

STATE OF NEW YORK, }
County of, } ss.:

....., being duly sworn, says: That he is a witness (to the last will and testament of), late of, and that he resides at, and is now at, in the State of New York.

That it would be a great hardship and inconvenience to this deponent to appear before the Surrogate's Court at within a reasonable time for the reasons that

That he is and will be able to appear before the Surrogate's Court of the County of, where deponent now is, at any reasonable time.

Sworn to before me this..... }
day of, 192.. }

FORM No. 84.

Order for Examination of Witness Before Another Surrogate.

[§ 74, ¶ 32]

Caption.

SURROGATE'S COURT, County of

In the matter of..... }

It appearing to the satisfaction of the surrogate, and the surrogate having good reason to believe that the testimony of, residing or now in, in the County of, State of New York, is material and necessary in the above-entitled proceeding, and that the said witness cannot attend before this court as a witness within a reasonable time without unusual hardship and inconvenience, as appears by his affidavit filed in this court; now on motion of, the petitioner in this proceeding, it is

Ordered, That the said witness.....be examined in this proceeding before the Hon., Surrogate of the County of, New York, at his office in the of on the day of, 192.., or on an adjourned day to be fixed by him, as to any and all matters within his knowledge concerning, (specifying the subject of the examination) upon the written interrogatories hereto annexed (or upon oral questions propounded to such witness).

(Where the witness is a subscribing or other witness in a probate proceeding add:)

It is further Ordered, that the original will of, now on file in this court, be transmitted with a copy of this order to the said surrogate, the same to be returned by him together with the examination or evidence taken hereunder.

It is further ordered, that written notice of the time and place when such examination shall be held be given to, who has appeared herein at least days before such examination.

Dated,

FORM No. 85.**Deposition of Witness and Certificate of Surrogate.**

[§ 74, ¶ 32]

In the matter of proving the last will and testament of	}
late of	
Deceased.	

Examination of, a witness sworn and examined in the above-entitled proceeding, before Hon., Surrogate of the County of Jefferson, pursuant to an order of, Surrogate of the County of Rensselaer, N. Y., made on the day of, 192...

(Use the usual deposition of subscribing witness.)

SURROGATE'S COURT.

STATE OF NEW YORK, }
County of Jefferson. } ss.:

I,, Surrogate of the County of Jefferson, hereby certify that pursuant to the annexed order of Hon., Surrogate of the County of Rensselaer, directing that be examined before me on the day of, 192.., I attended at my office in the City of Watertown, N. Y., and there took the foregoing examination of said witness, and that said examination was reduced to writing as above and the same was subscribed by said witness in my presence.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of [L. S.] my court the day of, 192.., in attestation thereof.

Surrogate.

FORM No. 86.**Deposition of Two Witnesses.**

[§§ 141, 144, ¶¶ 48, 63]

SURROGATE'S COURT, Rensselaer County.

In the matter of proving the last will and testament of	}
Deceased.	

County of Rensselaer, ss.

....., of the of, in the county of,
and of the of, in the county of,
being first duly sworn in open court, do depose as follows:

That they are the subscribing witnesses to the instrument now shown to them purporting to be the last will and testament of, late of the of, Rensselaer county, deceased, and which bears date on the day of, 19... That at the time aforesaid the said did, in their presence, sign h.. name at the end of said instrument and declare the same to be h.. last will and testament, and they thereupon, at h.. request, and in h.. presence and in the presence of each other, signed their names as attesting witnesses thereto. That at the time when said testa.... signed said will, and declared the same to be h.. last will and testament as aforesaid, and at the time when they signed the same as witnesses thereto, as aforesaid, the said was of sound mind and memory, of full age to execute a will and was not under any restraint to the knowledge, information or belief of these deponents.

NOTE.—Where Will was signed by mark add: And deponents further say (or deponent further says) that before said will was signed by said testator the provisions thereof were fully made known to h....and....he knew and understood the contents thereof.

Subscribed and sworn to before me this }
 day of, 192.. }

.....
 Surrogate.

FORM No. 87.

Deposition of Single Surviving Witness.

[§§ 142, 144, ¶¶ 49, 63]

SURROGATE'S COURT, County of Rensselaer.

In the matter of proving the last will and	}
testament of	
late of	
Deceased.	

County of Rensselaer, ss.

..... of the of, in the County of, being duly sworn as a witness in the above-entitled matter, and examined on behalf of the proponent to prove said will, says:

I was well acquainted with, the said testa....., and had known h.. for more than years before h.. death. The subscription of the decedent's name to the instrument now shown to me, and offered for probate as h.. last will and testament, and bearing date the day of, in the year of our Lord one thousand hundred and, was made by the decedent at street, in the of, in

the County of, in the presence of myself and, the other subscribing witness. At the time of such subscription the said decedent declared the said instrument, so subscribed by h.. to be h.. last will and testament; and I thereupon signed my name as a witness at the end of said instrument, at the request of said decedent, and in h.. presence, and in the presence of said I also saw said, the other subscribing witness, sign h.. name as a witness at the end of said will, and know that he did so at the request of said decedent and in h.. presence. The said decedent, at the time of so executing said instrument, was upwards of the age of twenty-one years and of sound mind, memory and understanding, and not under any restrain, or in any respect incompetent to make a will. And further this deponent says: That the said, the other subscribing witness to said will, is now dead (or absent from the State).

NOTE.—Add statement as to knowledge of contents where will was signed by mark.

.....

Subscribed and sworn to before me this }
 day of, 192.. }

.....,
 Surrogate.

FORM No. 88.

Deposition of Surviving Witness.

SURROGATE'S COURT, County of New York.

In the matter of proving the last will and
 testament of

Deceased,

As a will of real and personal property.

County and State of New York, ss.:

....., of, being duly sworn as a witness in the above-entitled matter, and examined on behalf of the applicant to prove said will, says: I was acquainted with, now deceased. The subscription of the name of said decedent to the instrument now shown to me and offered for probate as h.... last will and testament, and bearing date the day of, in the year one thousand nine hundred and was made by the decedent at the City of New York, on the day of, in the year one thousand nine hundred and, in the presence of myself and the other subscribing witness. At the time of such subscription the said decedent de-

clared the said instrument so subscribed by h.... to be h.... last will and testament; and I thereupon signed my name as a witness at the end of said instrument, at the request of said decedent, and in h.... presence.

The said decedent at the time of so executing said instrument, was upwards of the age of twenty-one years, and in my opinion of sound mind, memory and understanding, not under any restraint or in any respect incompetent to make a will. I also saw said, the other subscribing witness., sign h.... name.. as ..witness.. at the end of said, will, and know that ..he.. did so at the request and in the presence of said decedent. I knew said decedent for years before the execution of said instrument.

Witness sworn and examined before me this }
 day of, 192.. }

.....,
 Assistant to the Surrogate, New York County.

FORM No. 89.

Deposition of Witness Proving Handwriting of Deceased or Absence of Subscribing Witnesses.

[§ 142, ¶ 49]

SURROGATE'S COURT, County of New York.

In the matter of proving the last will and
 testament of
 late of
 Deceased,

STATE OF NEW YORK, }
 County of New York, } ss.:

....., of, being duly sworn as a witness in the above-entitled matter, and examined on behalf of the petitioner to prove said will, says, that he was well acquainted with, late of the, and with h.... manner and style of handwriting, having often seen h..... write, and that the signature purporting to be that of subscribed as a witness to the instrument in writing now produced and shown to deponent, purporting to be the last will and testament of, deceased, bearing date the day of, in the year one thousand nine hundred and, is the proper signature and handwriting of said witness. That said witness (is dead, absent from the State of New York).

Sworn to before me this }
 day of, 192.. }

.....,
 Surrogate.

FORM No. 90.

**Deposition of Witness Proving Handwriting of Testator when Both
Subscribing Witnesses are Dead or Absent.**

[§ 142, ¶ 49]

SURROGATE'S COURT, County of New York.

In the matter of proving the last will and
testament of

Deceased,

As a will of real and personal property.

STATE OF NEW YORK, }
County of New York, } ss.:

....., of, being duly sworn as a witness in the above-entitled matter, and examined on behalf of the petitioner to prove said will, says that he was well acquainted with, late of the, and with h... manner and style of handwriting, having often seen h... write, and that the signature purporting to be that of subscribed as testat..... to the instrument in writing now produced and shown to deponent, purporting to be the last will and testament of said deceased, bearing date the day of, in the year one thousand nine hundred and, is the proper signature and handwriting of said testat.....

Sworn to before me this }
day of, 192.. }

.....,
Surrogate.

FORM No. 91.

Affidavit Showing Absence of Subscribing Witnesses.

[§ 142, ¶ 49]

SURROGATE'S COURT, New York County.

In the matter of proving the last will and
testament of

Deceased,

As a will of real and personal property.

STATE OF NEW YORK, }
County of New York, } ss.:

....., being duly sworn, says that he is a managing agent for real estate in the City of New York, with an office at No. 99 Franklin street, in the Borough of Manhattan in said city; that he is and has been for a large number

of years well and personally acquainted with and
 subscribing witnesses to the will of this decedent, and was their bookkeeper and
 clerk for many years; that on, he saw said and
 sail from the port of New York on the steamship "Kron Princessin
 Cecilie" bound for the port of Bremen, Germany; that deponent of his own
 personal knowledge knows that said and left the
 city and State of New York, and the jurisdiction of the United States of North
 America, on or about said, and that they are now outside of said
 State and jurisdiction.

Sworn to before me this }
 day of, 192.. }

.....,

Assistant to Surrogate, New York County.

NOTE.—Any other statements showing absence or incompetency of subscribing
 witnesses under § 142, may be inserted.

FORM No. 92.

Order Dispensing with Testimony of Absent Subscribing Witnesses.

[§ 142, ¶ 49]

At a Surrogate's Court, held in and for the County of New York, at the
 Hall of Records in the Borough of Manhattan, in the City of New
 York, on the day of, in the year 192..

Present: Hon., Surrogate.

In the matter of proving the last will and
 testament of

Deceased,

As a will of real and personal property.

Upon reading and filing the annexed affidavit of, sworn to the
 day of, 192.., whereby it appears that the subscribing wit-
 nesses to the will herein are now out of the State of New York, and upon reading
 the original citation with waivers and proofs of service, mailing and publication
 thereof, heretofore filed in the office of the surrogate's Clerk; and the said
 citation having been duly returned, and the matter coming on to be heard on
 this day of, 192.., and Alexander, Watrish & Polk, having
 appeared on behalf of the petitioner for probate of the will herein, and there
 being no appearance in opposition thereto,

It is hereby ordered, adjudged and decreed that the testimony of
 and, subscribing witnesses to the will of, the de-
 cedent herein, be and the same hereby is dispensed with in this probate proceed-
 ing.

.....,

Surrogate.

FORM No. 93.

Order Dispensing with Testimony of Absent Witness.

At a Surrogate's Court, held in and for the County of
Bronx, at the Bergen Building, No. 1918 Arthur ave-
nue, near Tremont avenue, in said County, on the
day of, 192..

Present: Hon., Surrogate.

In the matter of proving the last will and
testament of
Deceased,

Upon reading the instrument propounded herein as the last will and testament
of the said, deceased, and the petition herein for its probate
verified by, both filed the day of, 192.., and
upon reading the deposition of verified and filed the day of
....., 192.., by all of which it has been shown to the satisfaction of
the Surrogate that was one of the subscribing witnesses to said
instrument and that the said (is dead, incompetent, absent from
the State of New York), and the citation herein having been duly issued, served,
waived and returned herein, and no objections to the probate of the said will
having been filed herein and no one having appeared herein except.....,
now, on motion of, Esq., attorney for the petitioner herein, it is

Ordered, That the testimony of the said subscribing witness...,
be and the same hereby is dispensed with.

Enter,
.....,
Surrogate.

FORM No. 94.

Order for Commission to Examine Subscribing Witness out of the State.

[§ 142, ¶¶ 32, 49]

At a Surrogate's Court held in and for the County of Rens-
selaer, at the Surrogate's Office in the City of Troy,
on the day of, 192..

Present: Hon., Surrogate.

In the matter of proving the last will and
testament of
Deceased,

Upon reading and filing the notice of motion herein, and the affidavit of
..... verified, 192.., by which it appears satisfactorily

that facts exist which authorize the issue of a commission in this proceeding, it is

Ordered, that a commission issue in this proceeding directed to Mary E. Height, of Osage, Mitchell County, in the State of Iowa, to examine upon oath upon interrogatories to be annexed to said commission, Willard L. Eaton, one of the witnesses named in said will as a witness on behalf of the proponent of said will.

It is Further Ordered, that a commission issue directed to John F. Logan, of Portland, Multnomah County, in the State of Oregon, to examine upon oath upon said interrogatories, John B. Cleland, one of the witnesses named in said will as a witness on behalf of the said proponent.

.....,
Surrogate.

NOTE.—Notice of motion should be used in those cases where an incidental order is asked for in a proceeding already instituted by petition.

FORM No. 95.

Order Appointing Commissioner.

The People of the State of New York:

To Mary E. Haight, Notary Public, residing at Osage, in the State of Iowa.

Know ye, that we, with full faith in your prudence and competency, have appointed you commissioner and by these presents do authorize you to examine under oath, upon the interrogatories annexed to this commission, Willard L. Eaton, who is at present living without the State of New York, to-wit: at Osage, in the State of Iowa, as a witness in the matter of proving the last will and testament of, late of the City of Troy, County of Rensselaer, State of New York, now deceased, on the part of the proponent, and to take and certify the deposition of the witness and return the same according to the directions hereunto annexed.

This commission, when executed, is to be forwarded by registered mail to John F. Logan, notary public, Portland, Ore.

Witness, Hon., Surrogate of our Court and County of Rensselaer and the seal of our Surrogate's Court, the day of, 192..
Surrogate

The People of the State of New York:

To John F. Logan, Notary Public, residing at Portland, in the State of Oregon.

(Continue appointment of second commissioner as in prior form; consult Rules of Civil Practice 127 et seq. as to proceedings on taking testimony out of the State by commission. Instead of attaching the sections of the code as heretofore required, there must be sent with the commission a copy of title 15 of the rules and a copy of article 29 of the Civil Practice Act.

FORM No. 96.

Interrogatories, Deposition and Certificate.

[§ 142, ¶¶ 32, 49]

SURROGATE'S COURT, Rensselaer County.

In the matter of proving the last will and testament of	}
Deceased,	

Interrogatories to be administered to Willard L. Eaton, residing at Osage, in the State of Iowa, and John B. Cleland, residing at Portland, in the State of Oregon as witnesses on behalf of the proponent to be examined on the annexed commissions in support of the will in the above-entitled proceedings.

First Interrogatory. What is your name, age and occupation, and where do you reside?

Second Interrogatory. Where did you reside on the 6th day of March, 1880?

Third Interrogatory. Were you acquainted with, late of the City of Troy, in the County of Rensselaer, State of New York, deceased? If so, state when, where and under what circumstances you became acquainted with him?

Fourth Interrogatory. Look at the instrument bearing date March 6, 1880, purporting to be and offered for probate as the last will and testament of said, deceased, and state whether or not you were present as a witness at the time of the execution of the same. Did you see saidsubscribe his name to the said instrument, and did he make such subscription in your presence, or did he acknowledge and declare to you that the signature "....." at the foot of said instrument was his signature?

Fifth Interrogatory. Did the said at any time declare said instrument by him subscribed to be his last will and testament? If so state when he so declared it to be his last will and testament. State also at what place said instrument was executed.

Sixth Interrogatory. State whether you were requested by said at the time of the subscription or declaration as to which you have already testified, to sign said instrument as a subscribing witness, and whether you did thereupon sign said instrument as such subscribing witness and whether either of the signatures of the witnesses to said instrument is your signature, and if so, specify which one.

Seventh Interrogatory. Who were present when the said instrument was declared by the said to be his last will and testament and to whom was such declaration made? In whose presence was such instrument signed by, or by whom declared to have been signed by him, and in whose presence did you sign your name as a witness thereto?

Eighth Interrogatory. Did you see the other person, whose name purports to be signed to said instrument as a subscribing witness thereto, sign his name or

her name thereto, and if so, state his or her name and whether he or she signed the same in the presence of said and yourself, and whether he or she signed as such witness at the request of said, and whether he declared to him or her that said instrument was his last will and testament?

Ninth Interrogatory. Was the said over the age of twenty-one years at the time of the executing of said instrument; and was he at such time under any restraint whatsoever, or in any respect incompetent to make a will?

Tenth Interrogatory. At the time of the execution of said instrument how long had you been acquainted with the other subscribing witness? Is the other subscribing witness now within the State of New York?

Eleventh Interrogatory. Do you know of any other matter or thing relating to the execution of the said instrument by said? If so, answer this question fully and particularly.

William W. Morrill, Attorney for Petitioner and Proponent, 306 Cannon Place, Troy, N. Y.

The foregoing interrogatories are allowed.

Dated,

Surrogate.

.....,

Form No. 97.

SURROGATE'S COURT.

STATE OF NEW YORK, {
County of Rensselaer, } ss.:

In the matter of the last will and testament
of
Deceased,

Deposition of Willard L. Eaton, a witness produced, sworn and examined on the day of, 192.., at Osage, in the County of Mitchell, in the State of Iowa, under and by virtue of commission issued out of the Surrogate's Court for the County of Rensselaer, in the State of New York, in the above-entitled matter of proving the last will and testament of, deceased, as follows:

Willard L. Eaton, being duly and publicly sworn, pursuant to the directions hereunto annexed and examined on the part of the proponent of said will, doth depose and say as follows:

First: To the first interrogatory he answers:

"Willard Lee Eaton. Age, 58 years. Occupation, attorney at law. Residence, Osage, Iowa."

Second: To the second interrogatory he answers:

"At Osage, Mitchell County, Iowa."

Third: To the third interrogatory he answers:

"I was personally acquainted with, late of the City of Troy,

in the County of Rensselaer, State of New York. I became acquainted with him when he first moved to Osage and went into partnership with the Tomlinson Brothers of Osage, Iowa, of the firm name of Tomlinson & Van Zile, dealers in Agricultural Implements, and I knew him intimately all of the time he continued to live in Osage."

(Authentication at foot of each page.)

MARY E. HAIGHT,

Commissioner.

Fourth: To the forth interrogatory he answers:

"The instrument offered for inspection bearing date March 6, 1880, purporting to be the last will and testament of is all in my own handwriting and was drawn by me at the request of, on the day that it purports to have been written. The testator subscribed his name to said instrument in my presence and in the presence of John B. Cleland, who was then my partner under the firm name of Cleland & Eaton, Attorneys at Law, at Osage, Iowa. The signature attached to said instrument is the genuine signature of, and I was present as a witness at the time of its execution at the request of"

Fifth: To the fifth interrogatory he answers:

"The said, at the time said instrument was subscribed by him, declared the same to be his last will and testament. To the best of my recollection, it was signed in the office of Cleland & Eaton, Attorneys at Law, at Osage, Iowa. John B. Cleland and myself were both present and saw him subscribe his name to said instrument, and at his request, signed our names as witnesses thereto in his presence and in the presence of each other."

Sixth: To the sixth interrogatory he answers:

"I was requested by said at the time the same was subscribed and declared as above testified and signed said instrument as a subscribing witness thereto and the name of Willard L. Eaton, of Osage, Mitchell County, Iowa, attached to the attestation of said instrument is my genuine signature and was made at the time it purports to have been made and as above testified."

Seventh: To the seventh interrogatory he answers:

"John B. Cleland, and myself were all present at the time said instrument was signed by and declared by him to be his last will and testament, and all the signatures above stated were made in the presence of each and all of us at the time said instrument was executed."

(Attestation.)

MARY E. HAIGHT,

Commissioner.

Eighth: To the eighth interrogatory he answers:

"I saw John B. Cleland, whose name purports to be signed to said instrument as a subscribing witness thereto, sign his name thereto at the request of said in his presence and in my presence."

Ninth: To the ninth interrogatory he answers:

"The said was over twenty-one years at the time he executed said instrument and was of sound mind and memory at the time of executing said in-

strument and the same was subscribed by the said without any restraint whatsoever."

Tenth: To the tenth interrogatory he answers:

"I became acquainted with John B. Cleland, the other subscribing witness, about the year 1873. He is now a resident of Portland, Oregon."

Eleventh: To the eleventh interrogatory he answers:

"I knew the testator,, all the time he lived at Osage. I cannot say when he came or when he moved away. My general recollection would be that he lived here about two years. I have no means at hand of refreshing my recollection just at this time. I knew him well both before and after the execution of said instrument. I know of nothing further except that said instrument was drawn by me as directed by the testator, At that time he was a young man of robust health and of good business ability.

MARY E. HAIGHT,
Commissioner.

W. L. EATON,

Witness.

STATE OF IOWA, }
Mitchell County, } ss.:

I, Mary E. Haight, do certify that Willard L. Eaton, the witness, personally appeared before me, on the 14th day of May, 1907, at three o'clock in the afternoon, at the city of Osage, in the State of Iowa, and after being sworn to testify the truth, the whole truth and nothing but the truth, did depose to the matter contained in the foregoing deposition, and did, in my presence subscribe the same, and indorse the exhibit annexed thereto. And I further certify that I have subscribed my name to each half sheet thereof, and to each exhibit, and I further certify that there were no appearances before me.

MARY E. HAIGHT.
Commissioner.

Commissioner's fees:

1. For administering oath	\$0 05
2. certificate	25
3. For transcript fees	1 50
Total	<u>\$1 80</u>

FORM No. 98.

Objections to Will and Codicil.

[§ 147, ¶ 52]

SURROGATE'S COURT, Rensselaer County.

In the matter of proving the last will and testament of	}
Deceased.	

..... as special guardian of, an infant, objects to the probate of the instruments propounded as the last will and testament and the codicil thereto of, deceased, upon the following grounds:

First: That the said instruments are not the last will and testament of, deceased.

Second: That the said will and codicil were not nor was either of them duly executed as required by law.

Third: That the said was not at the time of the making of said alleged will of sound mind and memory and capable of making a will.

Fourth: That the said was not at the time of making the alleged codicil to her last will and testament of sound mind and memory and capable of making a will.

Fifth: That the execution of the alleged will of was obtained by undue influence.

Sixth: That the execution of the alleged codicil to the will of was obtained by undue influence.

(If a jury trial of the issues is desired the same must be demanded in the objections as follows:)

Notice is hereby given that the contestant demands a trial by jury of the issues in this proceeding.

Dated, 192..

.....,
Contestant.
.....,
Attorney for Contestant.

(Add verification.)

FORM No. 99.**Decree Admitting Uncontested Will to Probate.**

[§ 144, ¶ 63]

At a Surrogate's Court, held in and for the County of New
 York, at the Hall of Records in the Borough of Man-
 hattan, New York City, on the day of,
 in the year 192..

Present: Hon., Surrogate.

In the matter of proving the last will and testament of	}
Deceased,	

The citation herein having been duly issued, served, and
 returned, and the Surrogate having on appointed
, Esq., special guardian of the infant, herein, the
 allegations of the parties appearing having been heard, and the proofs having
 been duly taken by the Surrogate, among other things as to the execution of
 said instrument.., bearing date, and the probate of the said will
 not having been contested, and it appearing to the Surrogate that
 the will was duly executed, and that the testat...., at the time of executing
 it, was in all respects competent to make a will and not under restraint:

It is Ordered, Adjudged and Decreed, That the instrument.. offered for pro-
 bate herein be and the same hereby is admitted to probate as the last
 will and testament of the said deceased, valid to pass personal
 property, and that letters testamentary be issued thereon to the execut....
 who may qualify thereunder.

It is Further Ordered, That, Esq., the special guardian of the
 infant, herein is hereby allowed dollars for his

FORM No. 100.

Decree Granting Probate of Will and Codicil—Uncontested.

[§ 144, ¶ 63]

At a Surrogate's Court, held in and for the County of
Rensselaer, at the Surrogate's Office, in the City of
Troy, in said county, on the day of,
192..

Present: Hon., Surrogate.

In the matter of proving the last will and testament of	}
Deceased.	

On reading and filing proof of the due service of the
citation herein on the parties therein named, and upon due proof of the execu-
tion of the paper propounded as the last will and testament of,
late of the of, in said county, deceased, bearing date
on the day of, 19.., and of the codicil thereto bearing date
the day of, 19.., and heir.. at law and next of
kin of said deceased, appearing and infant heir..
at law and next of kin of said deceased, appearing by duly
appointed special guardian, and it appearing by such proofs that the said will
and codicil were duly executed; that the testat... at the time of executing
the same was of full age for making a will, was of sound mind and memory
and not under restraint, and in all respects competent to make a will, and the
probate thereof not having been contested

It is Ordered, Adjudged and Decreed, that the said papers, purporting to be
the last will and testament and codicil thereto of said, deceased,
are, taken together, last will and testament, and were each duly
executed to pass real and personal estate and that the same be admitted to
probate as a will of real and personal estate, and recorded as such.

Witness, Hon., Surrogate, and the Seal of the Court,
the day and year first above written.

.....,
Surrogate.

FORM No. 101.

Decree Granting Probate—Revoking Former Letters Testamentary or of Administration.

[§ 154, ¶¶ 66, 110]

Where letters of administration have been issued upon the same estate and thereafter a decree granting probate of the will of such deceased is made, the decree must revoke the prior letters.

Where a will has been admitted to probate and letters testamentary have been issued thereupon, and thereafter a subsequent will is admitted to probate the decree admitting such subsequent will to probate must revoke the former letters, and, therefore, a similar clause revoking such former letters should be incorporated into the decree. (§ 154.)

After the usual recitals in the decree add: And it appearing that letters have been heretofore granted out of this court upon the estate of said deceased,

It is hereby Further Ordered, Adjudged and Decreed, that the letters heretofore granted in this court upon the estate of to, and dated the day of, 192., are hereby revoked.

FORM No. 102.

Order Directing Trial by Jury.

At a Surrogate's Court, held in and for the County of Bronx, at the County Court House, in the County of Bronx, on the day of, in the year one thousand nine hundred and twenty-.....

Present: Honorable, Surrogate.

In the matter of proving the last will and testament of	}
Deceased,	
as a will of real and personal property.	

A petition for the probate of a paper writing purporting to be the last will and testament of, deceased, verified the day of, 192., having been duly filed, by which it appears that said paper writing bears date of day of, 19..; and a citation having been duly issued thereupon and objections to the probate of said paper writing as the last will and testament of the above-named decedent having been duly filed; and it appearing by said objections that controverted questions of fact have arisen in this proceeding and a trial by jury of such issues herein having been seasonably demanded; it is

Ordered and directed, that there be had before the Surrogate and a jury, at a Trial Term of the Surrogate's Court of the County of Bronx, to be held commencing Monday the day of, 192., a trial of the following issues of fact:

I. Did the testator subscribe the paper offered for probate at the end thereof in the presence of the attesting witnesses or acknowledge to each of them that such subscription appearing on said paper had been made by h....?

II. At the time of making such subscription or acknowledgment did the said declare to the attesting witnesses that the paper offered for probate was h.... last will and testament?

III. Were there at least two attesting witnesses, each of whom signed his or her name at the end of said paper at the request of said

IV. At the time of the execution of the paper offered for probate was the said of sound and disposing mind and memory?

V. At the time of the execution of the said paper was the said free from restraint?

VI. Was the execution of the said paper by the said caused or procured by fraud, deceit or undue influence of the proponent, or any other person or persons?

.....,
Surrogate.

FORM No. 103.

Petition for Order Directing How Notice of Contest Shall be Served.

[§ 148, ¶ 52]

SURROGATE'S COURT, County of New York.

In the matter of proving the last will and testament of	}	Petition.
Deceased.		

To the Surrogate's Court of the County of New York:

The petition of respectfully shows:

I. That your petitioner is the execut.... named in the last will and testament of, late of the County of New York, deceased.

II. That said last will and testament was duly filed for probate, and that proceedings for the probate of said last will and testament have been begun by your petitioner.

III. That objections have been filed to the probate of said last will and testament.

IV. That a notice of probate to the legatees and devisees named in said will

.....

as specified in section 146 of the Surrogate's Court Act has been filed in the Surrogate's Court. That said notice has the additional statement endorsed thereon that objections have been filed to the probate of said will as required by section 148 of the Surrogate's Court Act.

V. That all of the persons named in said notice are of full age and of sound mind except

Wherefore, your petitioner prays for an order directing in what manner and within what time such notice shall be served on the persons therein named, and that the petitioner may have such other and further relief as the court may deem proper.

[Verification.]

.....

FORM No. 104.

Order Directing Manner of Service of Notice of Objections.

At a Surrogate's Court held in and for the County of New York, at the Hall of Records in the Borough of Manhattan, New York City, on the day of, 19..

Present: Hon., Surrogate.

In the matter of proving the last will and testament of
Deceased.

On reading and filing the petition of, the executor named in the last will and testament of, deceased, a resident of the County of New York, by which it appears that objections to the probate of said will have been filed herein,

Now, on motion of, attorney for the petitioner, the proponent herein, it is

Ordered, that the notice of probate filed herein and the notice of objections indorsed on said notice of probate be served personally upon the persons named in said notice of probate who are residents of the State such service to be made at least eight days before the day of, 19..; which day is hereby fixed for the hearing of said objections.

It is Further Ordered, That service of said notices upon such of said persons as are not residents of this State shall be made in the manner following: By depositing at least sixteen (16) days before the said day of, 19.., in the post office in the Borough of Manhattan, City, County and State of New York, a copy of each said notices, contained in a securely closed, post-paid

wrapper, directed to each of the persons named in said petition respectively, at the places therein designated as their addresses.

In the County of Bronx the order should describe the post office as "in the County of Bronx, to wit: at Station R thereof at 378 East 149th street in said county."

FORM No. 105.

Notice to Legatees, etc., of Contest.

SURROGATE'S COURT, County of New York.

In the matter of proving the last will and
testament of
Deceased.

To, whose post office address is, the legatees, devisees and other beneficiaries named in the last will and testament of, deceased, who have not appeared by attorney.

Take Notice, That said last will and testament has been offered for probate, that the name and post office address of the proponent is, and that objections have been filed to the probate of said will and that the same will be heard at a Trial Term of the Surrogate's Court of the County of New York, at the Hall of Records, in the Borough of Manhattan, in the County of New York on the day of, 192.., at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated, New York,, 192..

.....,

Attorney for Petitioner.

Office and post office address, New York City.

FORM No. 106.

Notice to Legatees, Devisees and Beneficiaries where Will is Contested.

[§ 148, ¶ 52]

Same notice as in Form No. 110, with this addition:

To the above-named persons:

Take notice that objections to the probate of such will have been filed by, and that said objections will be tried at a term of the Court to be held at the of, New York, on the day of, 192.., at 10 o'clock a. m., or as soon thereafter as the same shall be reached.

.....,

Attorney for Executor and Proponent.

Affidavit of Mailing Notice.

STATE OF NEW YORK, }
 County of, } ss.:

....., being duly sworn, deposes and says that he is over the age of eighteen years and resides at That on the day of, 19.., he mailed a copy of the annexed notice to the persons mentioned therein as persons interested under said will by depositing the same in the post office at, New York, in a sealed, post-paid wrapper addressed to each of them respectively at the post office address therein given.

Sworn to before me this }
 day of, 192.. }

FORM No. 107.

Decision by Surrogate.

[§ 71, ¶ 32]

SURROGATE'S COURT, Rensselaer County.

In the matter of the will of
 Deceased.

A paper purporting to be the last will and testament of, deceased, having been duly offered for probate in this court by, named as executrix therein, and objections to the probate thereof having been duly made by, a niece of said deceased, by Lansing Hotaling, her special guardian, and the said having duly appeared in person and by Calvin S. McChesney, her attorney, and the said special guardian having duly appeared in person, and the proofs and allegations of the parties and the arguments of counsel having been heard and having duly considered the briefs of counsel, and the matter having been duly adjourned from time to time; now after due deliberation had I decide and find as follows:

That said died at the town of Brunswick, Rensselaer County, New York, on the day of, 19..

That deceased left her surviving her sister,, the proponent herein, and her niece,, the contestant herein, her only heirs-at-law and next of kin.

That on the 11th day of February, 1904, the said, duly executed the paper offered for probate herein as and for her last will and testament; that the same was duly executed in form to pass real and personal property.

That on said 11th day of February, 1904, and at the time of the execution of said will the said was of sound mind and memory, in all respects competent to make a will and not under restraint.

That she was at the time of making said will a citizen of the United States,

of the age of sixty-one years or thereabouts and resided in the town of Brunswick, Rensselaer County, New York.

That the said will should be admitted to probate and recorded as a will of real and personal property, and that a decree be entered accordingly.

Dated,, 192..

.....,

Surrogate.

FORM No. 108.

Decree—Contested Probate.

[§ 144, ¶ 63]

At a Surrogate's Court, held in and for the County of Rensselaer, at the Surrogate's Office, in the City of Troy, in said County, on the day of, 192..

Present: Hon., Surrogate.

<p>In the matter of proving the last will and testament of, Deceased.</p>

Satisfactory proof having been made of the due service of the citation heretofore issued in this matter, requiring all persons entitled to notice of this proceeding to show cause before the Surrogate's Court of the County of Rensselaer, in the State of New York, why the probate of the last will and testament of, late of the town of Brunswick, in said county, deceased, bearing date on the 11th day of February, 1904, should not be had; and, the sole executrix named in said will and the petitioner herein and an heir-at-law and next of kin, having appeared in person and by Calvin S. McChesney, her attorney, in support of said probate; and, an infant heir-at-law and next of kin of said deceased, appearing by Lansing Hotaling, her duly appointed special guardian who filed an answer and objections to said probate:

And witnesses having been examined and proofs taken by and on behalf of the proponent and contestant touching the facts and circumstances attending the execution of said will and the competency of the testatrix to make the same, and her freedom from restraint, and the surrogate having heard such proofs and the allegations of the respective parties, and due deliberation having been thereupon had, it is Ordered, Adjudged and Decreed

1. That the instrument in writing bearing date the 11th day of February, 1904, propounded as and for the last will and testament of the said, deceased, in this proceeding is the last will and testament of the said, deceased, and was duly executed as required by law. That the said testatrix at the time of executing said will was of full age, of sound mind and memory

and not under any restraint and in all respects competent to devise real estate and bequeath personal property.

2. It is Further Ordered, Adjudged and Decreed, that the said paper, offered for probate herein, be and the same hereby is admitted to probate as the last will and testament of the said, deceased, valid to pass real and personal property, and that the said will be recorded, and that letters testamentary issue to the executrix named in said will who may qualify thereunder.

3. It is Further Ordered, Adjudged and Decreed, that there be allowed and paid out of the estate of said deceased to the proponent for costs of this proceeding the sum of dollars and the further sum of dollars and cents for taxable disbursements herein; and that there be allowed and paid out of the estate of said deceased as costs to Lansing Hoteling as special guardian, the sum of dollars.

Witness, Hon., Surrogate, and the Seal of the Court, the [L.S.] day and year first above written.

.....,
Surrogate.

FORM No. 109.

Notice of Probate to Beneficiaries.

[§ 146, ¶ 77]

SURROGATE'S COURT, County of New York.

In the matter of proving the last will and testament of, <div style="text-align: right;">Deceased.</div>	}
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To the following named persons:

Take notice that the last will and testament of, deceased, has been offered for probate, and that the names and post office addresses of the proponent and of the legatees, devisees and other beneficiaries, as set forth in the petition herein, who have not been cited or have not appeared or waived citation, are as follows:

....., the proponent, whose post office address is
 (names of legatees, devisees or beneficiaries and post office address)

Dated, New York,, 192..

.....,
 Attorney for Petitioner.
 Office and Postoffice Address,

.....

Affidavit of Service of Notice of Probate, Section 146.

SURROGATE'S COURT, County of New York.

In the matter of proving the will of
Deceased.

County of New York, ss.:

..... of, being duly sworn, says that on the day of, 192.., he deposited in the post office, at the County of New York, a copy of the within notice of probate, contained in a securely closed post-paid wrapper, directed to each of the persons named in the within notice at the post office address therein written opposite to his name or stated to be his.

[Jurat.]

.....

FORM No. 110.

Notice of Probate to Legatees, Devisees and Beneficiaries Named in a Will.

[§ 146, ¶ 77]

SURROGATE'S COURT, County of

In the matter of
.....

Notice is hereby given that the last will and testament of, late of the of, in the county of has been admitted to probate (or offered for probate) in the Surrogate's Court of the County of at the of, New York. That the names of the persons interested in any manner under said will who have not appeared, waived citation or been cited in such proceeding are:

Name.	Postoffice Address.
.....,
.....,
.....,
Dated,	

.....,

Executor and Proponent.

Postoffice Address,

.....

FORM No. 111.

Oath of Executor and Designation of Clerk to Receive Service of Process.

[§ 98, ¶ 105]

KINGS COUNTY SURROGATE COURT.

In the matter of the petition of
to prove the last will and testament of
late of the County of Kings, deceased.

STATE OF NEW YORK, }
County of Kings. } ss.:

I,, Execut..., named in the last will and testament of
....., late of the County of Kings, deceased, being duly sworn, do depose
and say:

That I reside at No., in the, that I
am over twenty-one years of age, and that I will well, faithfully and honestly
discharge the duties of Execut... of said last will and testament of

Subscribed and sworn to, this day }
of, 192.. }

Probate Clerk, Surrogate's Court, Kings County, N. Y.

I,, residing at No., do hereby designate the
Clerk of the Surrogate's Court of the County of Kings, and his successor in
office as a person on whom service of any process issuing from said Court in
this proceeding or in any other proceeding which shall effect the estate of the
said, deceased, may be made in like manner and with like effect
as if it were served personally on me, whenever I cannot be found and served
within the State of New York after due diligence used.

(Acknowledgment.)

FORM No. 112.

Consent of Trust Co. or Bank to Act as Executor.

SURROGATE'S COURT, County of

In the matter of the probate of the will of
.....
Deceased.

The Trust Company, duly incorporated and having its principal
place of business at, city of, N. Y., hereby accepts

the appointment as (executor, trustee) under the last will and testament of , late of the of , N. Y., and consents to act as such thereunder.

Dated, , 192..

(Add acknowledgment.)

FORM No. 113.

Bond of Executor.

[§§ 97, 169, ¶¶ 105, 77]

Know All Men By These Presents, That we as principal and and as sureties are held and firmly bound unto the People of the State of New York, in the sum of dollars, current money of the United States of America, to be paid to the said People, to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of , in the year of our Lord, one thousand nine hundred and

The condition of this obligation is such that if the above bounden , as executor of the last will and testament of deceased, shall faithfully discharge the trust resposed in as such, and also that will obey all lawful decrees and orders of the Surrogate's Court of the County of Rensselaer, touching the administration of the estate committed to , then this obligation to be void, otherwise to be of force.

Sealed and delivered in }
the presence of }

..... [L. S.]
..... [L. S.]
..... [L. S.]
..... [L. S.]

(Add justifications, acknowledgments and approval.)

FORM No. 114.

Bond of Executor.

[§§ 97, 169, ¶¶ 77, 105]

Know all Men by these Presents, That we , are held and firmly bound unto the People of the State of New York, in the sum of

dollars, lawful money of the United States of America, to be paid to the said People; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated the day of, one thousand nine hundred and twenty.

The condition of this obligation is such that if the above bounden shall faithfully execute the trust reposed in, as executor of the last will and testament of, deceased, and obey all lawful decrees and orders of the Surrogate's Court of the County of New York touching the administration of the estate committed to, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in }
presence of }

..... [L. S.]

..... [L. S.]

I know the within-named sureties to be the identical persons that they represent themselves to be, and to be responsible parties, and I believe them to be worth at least dollars each in good property.

STATE OF NEW YORK, }
County of New York, } ss.:

..... being duly sworn, deposes and says that he is one of the sureties named in the annexed recognizance; that he resides at No. street, in the, that he is a holder, and that he owns the following property, consisting of, and that the same is of the value of not less than dollars, and is subject to no incumbrance except a mortgage of, and that there are no unsatisfied judgments or executions against him, and that he is under no recognizance, nor is he upon any bond, undertaking or written obligation whatever. and that he is worth in good property, exclusive of property exempt by law from levy and sale under an execution, not less than dollars over and above all debts, liabilities and lawful claims against him, and all liens, incumbrances and lawful claims upon his property.

Sworn to before me this }
day of, 192.. }

.....

Surety.

(Add other justifications and acknowledgments.)

FORM No. 115.

Petition for the Probate of a Lost or Destroyed Will.

[§ 143, ¶ 51]

SURROGATE'S COURT, Rensselaer County.

In the matter of the probate of the last will and testament of <div style="text-align: right;">Deceased.</div>	}
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To the Surrogate's Court of the County of Rensselaer:

The petition of, residing in the City of Troy, in said county, respectfully shows to the court:

That, the above-named deceased, died at the City of Troy, which was the place of his residence at the time of his death, leaving a last will and testament which relates to both real and personal property, and which said last will and testament bears date the day of, 19.., and is signed at the end thereof by the testator and by and, as subscribing witnesses, and was in existence at the time of testator's death (or if fraudulently destroyed in the testator's lifetime that fact should be stated).

That your petitioner is the executor (or legatee) named in said last will and testament.

That your petitioner does not know of any codicil to said last will and testament, nor is there any to the best of his knowledge, information and belief.

Your petitioner further states that the said last will and testament of said deceased has been lost (or destroyed) by accident (or design) and that the facts concerning the loss of said will are as follows:

.....

(Here state all the facts relating to the loss or destruction of the will.)
 that said last will and testament was executed in all respects in conformity to the statutes of the State of New York and that your petitioner will be able to establish the validity of such last will and testament to the satisfaction of this court by at least two credible witnesses, and that the contents of said will are known to said witnesses (or that a correct copy or draft is in the possession of petitioner, in which case only one credible witness is necessary.)

(Continue as in petition for probate.)

NOTE.—Issue and serve citation and notice in the usual way.

FORM No. 116.

Decree Probating Lost or Destroyed Will.

[§ 143, ¶ 51]

At a Surrogate's Court, held in and for the County of
Rensselaer, at the Surrogate's Office in the Court House
at the City of Troy, N. Y., on the day of
....., 192...

Present: Hon., Surrogate.

In the matter of the probate of the last will and testament of	}
Deceased.	

Upon reading and filing the petition of, residing in the City of Troy in the County of Rensselaer, praying for the probate of the last will and testament of, late of the Town of, deceased, and alleging therein that the last will and testament of the said deceased had been lost since the death of the testator (or if fraudulently destroyed recite the fact), and that said last will and testament was duly executed in conformity to the laws of the State of New York and valid as a will of real and personal estate, and said petition further alleging all facts necessary to give this court jurisdiction, a citation was thereupon issued to all the heirs-at-law and next of kin of said deceased, citing and requiring them to show cause in this court on the return day thereof, and on such return day the petitioner having appeared in person and by, his attorney, and filed proof of the due service of the citation herein on the parties therein named, and, heirs-at-law and next of kin of said deceased having appeared by, his attorney (or in person), the Surrogate proceeded to hear the proofs and allegations of the parties concerning the execution and loss (or destruction) of the alleged last will and testament of the said deceased, and it appearing from such proofs and allegations that the said deceased did make and execute a paper writing in his lifetime in conformity to the statutes of the State of New York as and for his last will and testament which was dated the day of, 19..., and that said paper has been lost (or destroyed) since the death of said deceased, and the substance of the said last will and testament and the gifts and devises therein made having been clearly and distinctly proved by at least two credible witnesses (or, if a copy or draft of said will is before the court, by one credible witness); and it further appearing from the proofs presented that the testator at the time of executing said last will and testament was of full age for making a will, was of sound mind and memory and not under restraint, and in all respects competent to devise real estate, and the probate thereof

not having been contested (or if contested state by whom), and upon all the evidence and after due deliberation,

It is Ordered, Adjudged and Decreed, that the above-named deceased did, during his lifetime, make and execute a paper writing as and for his last will and testament which was duly executed to pass real and personal estate, and that said paper has been lost by accident (or destroyed) since the death of the testator.

It is Further Ordered and Adjudged, that said will as shown by the proofs be admitted to probate as a will of real and personal estate, and is hereby proved and established to be as follows:

.....
(Here recite the will as shown by the proofs or the draft or copy.)
.....

Witness, Hon., Surrogate, and the Seal of the Court, the
[L. S.] day and year first above written.

.....
Surrogate.

FORM No. 117.

Petition for Re-probate of Will Against Infant for Whom no Special Guardian was Appointed.

[¶ 73]

SURROGATE'S COURT, Rensselaer County.

In the matter of the last will and testament of, late of the Town of Nassau, N. Y.,	Deceased.
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To the Surrogate's Court of the County of Rensselaer:

The petition of, residing at Nassau in the County of Rensselaer, respectfully shows:

That your petitioner is an executtor of the last will and testament of
....., deceased; that said last will and testament above mentioned relates to both real and personal property and bears date the 11th day of October, 1904, and is signed at the end thereof by Abel Merchant and Charles R. Reynolds as subscribing witnesses; that your petitioner does not know of any codicil to said last will and testament, and does not believe there is any codicil to said will; that said deceased was at the time of her death a resident of the Town of Nassau, and departed this life at the Town of Nassau, N. Y., on the day of, 192...

Your petitioner further shows that by a decree of the Surrogate's Court of the County of Rensselaer made and entered, 192..., the last

will and testament of was admitted to probate by the Surrogate's Court of Rensselaer County as to all the heirs and next of kin of said except a grandniece, Pearl Maxon, who resides at Ormond, Florida, who was not properly made a party to the proceedings of said probate; that at the time of the probate of said will the said Pearl Maxon was a minor of the age of fourteen years and upwards, and that your petitioner had been erroneously informed as to the age of said Pearl Maxon, and had supposed that she was an adult of the age of twenty-one years and upwards, and that upon the probate of said will on, 192.., there was no special guardian appointed to look after and care for the interest of the said Pearl Maxon in the estate of decedent; that with the exception of the said Pearl Maxon all the remaining heirs-at-law and next of kin of said were properly cited; that personal service of the citation cannot with due diligence be made upon the above-named Pearl Maxon within the State of New York as Pearl Maxon is a non-resident and resides at Ormond in the State of Florida.

Your petitioner further prays for an order directing the service of the citation to be issued without the State by publication, pursuant to the Surrogate's Court Act.

Your petitioner further prays that a citation issue to the above-named Pearl Maxon requiring her to show cause why the evidence and the proceedings already had to prove the will of said should not stand and why the decree admitting said will to probate and adjudging the same to be a valid will, to pass real and personal estate should not be sustained, and said will of, deceased, be decreed to be the last will and testament of said testatrix as to said Pearl Maxon and that she be bound thereby with the same force and effect as if she had been previously cited upon the original probate thereof.

Dated, Nassau, N. Y.,, 19...

(Verification.)

.....
Petitioner.

NOTE.—Add any necessary allegations required by § 51, ¶ 25.

In some cases an adult heir-at-law has been omitted, so that title to real property is imperfect. In such cases there may be allegations in the petition similar to the following:

That your petitioner is now the owner and in possession of certain property, whereof Michael McDonough died seized; that she traces her title from him through his devisees; that your petitioner and her immediate and remote predecessors in title have been in possession of said premises since the death of Michael McDonough; that she is now informed that one Rebecca McDonough, who was not cited upon the proof of the will of said Michael, now claims to be one of his heirs-at-law and next of kin; that your petitioner desires that said will may be proved and admitted to probate as against the said Rebecca McDonough.

Wherefore, etc.

FORM No. 118.

Decree Confirming Original Probate.

[¶ 73]

At a Surrogate's Court held in and for the County of Rensselaer, at the Court House in the City of Troy, N. Y.,
on the day of, 192...

Present: Hon., Surrogate.

SURROGATE'S COURT, Rensselaer County.

In the matter of the probate of the last will
and testament of, late of the
Town of Nassau, County of Rensselaer,
Deceased.

....., executor of the last will and testament of, deceased, having heretofore and on the day of, 192.., duly filed his petition duly verified, praying that the last will and testament of, deceased, be declared to be the last will and testament of said, deceased, as to Pearl Maxon of Ormond, in the State of Florida, and a supplemental citation having been duly issued and directed to said Pearl Maxon requiring her to show cause why evidence taken and the proceedings already had to prove the will of said, deceased, should not stand, and why the decree admitting said will to probate and adjudging the same to be a valid will to pass real and personal estate should not be sustained, and said will of, deceased, be decreed to be the last will and testament of said, deceased, as to said Pearl Maxon, and that she be bound thereby with the same force and effect as if she had been previously cited upon the original probate thereof.

And on reading and filing the proof of the due service of said supplemental citation on said Pearl Maxon and the petitioner herein,, appearing by Pierce H. Russell, Esq., his attorney, and said Pearl Maxon, infant heir-at-law and next of kin of said deceased, appearing by Edmund L. Worden, Esq., her duly appointed special guardian and the decree heretofore made and entered herein on the, day of, 192.., together with all the proceedings had herein on which said decree is founded being produced in evidence from the records of this court, and it appearing therefrom that the paper propounded as the last will and testament of, late of the Town of Nassau, Rensselaer County, New York, deceased, dated October 11, 1904, was duly executed by said testatrix and that said testatrix at the time of executing the same was of full age for making a will, was of sound mind and memory and under no restraint and in all respects competent to devise real estate, and the probate thereof not having been contested by the said Pearl Maxon.

It is Ordered, Adjudged and Decreed, that the evidence taken and the proceedings already had to prove the will of said, deceased, and the decree admitting said will to probate and adjudging the same to be a valid will to pass real and personal estate be and they are hereby sustained, and that the will of said, deceased, be hereby decreed to be the last will and testament of said as to the said Pearl Maxon, and that said Pearl Maxon be and she hereby is bound by said evidence, proceedings, decree and will with the same force and effect as if said Pearl Maxon had been cited to attend the original probate of said will, and that said last will and testament of is her last will and testament, as to said Pearl Maxon and is duly executed to pass real and personal estate and that the same be and is hereby admitted to probate as a will of real and personal estate and recorded as such.

Witness, Hon., Surrogate, and the Seal of the Court, the
[L. S.] the day and year first above written.

.....
Surrogate.

FORM No. 119.

Petition for Re-probate of Will Against Unknown Heir-at-law not Cited.

[¶ 73]

SURROGATE'S COURT, Rensselaer County.

In the matter of the probate of the last will and testament of, late of Troy, N. Y., deceased, as to the unknown next of kin and heirs-at-law (if any there be) of the said deceased, and as to the State of New York.

To the Surrogate's Court of the County of Rensselaer:

The petition of, residing at No. 2354 Sixth avenue in the City of Troy, Rensselaer County, New York, respectfully shows: That resided in the said city and county at and prior to the time of his death; that he left him surviving, who was his wife; that he left a last will and testament; that said will relates to both real and personal property and bears date March 23, 1865, and is signed at the end thereof by the testator and by William Cluett and Thomas Goldsmith as subscribing witnesses; that said was named in said will as executrix thereof, and the testator gave, devised and bequeathed to her all his property of every name and nature; that subsequent to his death, the said, as such executrix, presented to

the Surrogate's Court of said county her petition setting forth, among other things, the death of said, and asking that the said will be proved as a will of real and personal property, and that letters testamentary thereon be issued to her. Said petition is duly verified and is dated September 2, 1890, and was filed in the said Surrogate's Court on that date, and set forth that said did not leave any next of kin or heirs-at-law him surviving.

Your petitioners are informed and believed that through mistake and inadvertence no citation was asked for or was issued and addressed to any person whether by name or as unknown next of kin or heirs-at-law of the said testator, or to the then Attorney-General of the State of New York, to attend the probate of said will, or was served upon any person whomsoever, either personally or by publication and mailing; that due proof of the due execution of the said will, according to the laws of the State of New York, was presented to the Surrogate and in the Surrogate's Court of said county, and was duly filed in said court where such proofs have ever since remained, and thereupon, a decree was granted and was duly filed and entered in said court on the 4th day of September, 1890, admitting said will to probate as a will of real and personal property. Said will is of record in the Book of Surrogate's Records No. 137, at page 123. That the executrix named in said will duly qualified as such executrix and letters testamentary thereon were duly issued to her by the Surrogate of said county; that said decree has ever since remained in full force and effect; that no proceedings have ever been taken by any person, questioning or challenging the validity of said will, or its execution, or depositions or proof taken in connection with the probate thereof or the said decree.

That at the time of his death the said was the owner of certain lots and premises and the buildings thereon situated in the City of Troy, County and State aforesaid, and known by street numbers as Nos. 2350 and 2354 Sixth avenue, and Nos. 2329 and 2331 Seventh avenue, respectively.

That in the year 1897 the said died, leaving a last will and testament under and by which she gave, devised and bequeathed to her brothers,, (who are your petitioners), all the rest, residue and remainder of her property, both real and personal, share and share alike, after the payment of certain money legacies which were given by her. Said will is dated July 15, 1897, and was duly admitted to probate in the Surrogate's Court of Rensselaer County on the 11th day of October, 1897, and is of record in Book of Records No. 168, page 669, etc.

Your petitioners are of full age and sound mind.

Your petitioners allege upon information and belief that the said did not leave any heirs-at-law or next of kin him surviving.

That said decedent,, left him surviving no child or children, adopted child or children; the issue of any deceased child's husband or wife, or brother or sister of the half or whole blood, or the issue of any deceased brother or sister, or any deceased brother's wife or any deceased sister's husband, or any next of kin or heir-at-law, except as above stated.

Your petitioners further allege that if said, left him surviving any next of kin or heirs-at-law, their names are unknown to your petitioners and cannot, after diligent inquiry, be ascertained and their places of residence, if there be any such heirs-at-Law and next of kin, are unknown to your petitioners and cannot, after diligent inquiry, be ascertained, and your petitioners are entirely unable to ascertain, with reasonable diligence, a place or places where any such persons to be served with a citation would probably receive matter transmitted through the post-office.

Your petitioners further state that, who was a witness to the will of said, died in the lifetime of the said, and that, the other witness to the will, has died since the probate of the said will.

That your petitioners do not know of any codicil to the will of said deceased, nor is there any to the best of their information and belief.

Your petitioners further state that they recently entered into a contract for the sale of a portion of the premises aforesaid known as Nos. 2329 and 2331 Seventh avenue and that they desire, and it is important to them, to have the probate of said will fully established and their title to all such premises unquestioned and unquestionable so far as such probate goes.

Upon information and belief they state that Hon. is now the Attorney-General of the State of New York.

Wherefore, your petitioners pray that a citation and order issue out of the court directed to the said unknown heirs-at-law and next of kin of the said, deceased (if any there be), and to the Attorney-General of the State of New York, to show cause, if any they have, why the evidence taken and the proceedings heretofore had to prove the last will and testament of said, deceased, should not stand, and why the decree admitting said will to probate and adjudging the same to be a valid will to pass real and personal estate should not stand, and why they should not be bound thereby with the same force and effect as if they had been previously cited to attend the original probate of said will.

Dated at Troy, N. Y.,, 192...

(Add verification.) Petitioners.

Note.—Add allegation required by § 51, ¶ 25.

Citation in cases of Re-probate.

Citation in usual form, including “then and there to show cause why the evidence taken and the proceedings already had to prove the will of said deceased, should not stand, and why the decree admitting said will to probate and adjudging the same to be a valid will to pass real and personal estate should not be sustained, and said will of, deceased, be decreed to be the last will and testament of, deceased, as to,

and that you and each of you be bound thereby with the same force and effect as if you and each of you had been previously cited upon the original probate thereof.

In Testimony Whereof, we have caused the Seal of our said Surrogate's Court to be hereunto affixed.

Witness, Hon., Surrogate of the said County, at the City
[L. S.] of Troy, the day of, 192...

.....

Clerk of the Surrogate's Court.

FORM No. 120.

Objections to the Granting of Letters Testamentary to Executor Named in Will.

[§ 96, ¶ 105]

SURROGATE'S COURT, Rensselaer County.

In the matter of the estate of
Deceased.

To the Surrogate's Court of the County of:

..... interested in the above entitled estate as hereby files objections to the grant of letters testamentary to named as executor in the will of said deceased, on the following grounds, namely:

(Insert objections.)

Dated,, 192..

.....

(Add verification.)

NOTE.—Use the same general form in case of a guardian or trustee.

FORM No. 121.

Order Directing Personal Appearance of Executor Named in Will.

[§ 96, ¶ 105]

SURROGATE'S COURT, Rensselaer County.

Caption.

In the matter of the estate of
Deceased.

On reading and filing the objections of of the City of Troy, a legatee under the last will and testament of, late of the Town of

Schaghticoke, in said county, deceased, against the granting of letters testamentary under the said last will and testament to, the sole executor named therein.

It is Ordered that the said personally appear before the Surrogate's Court of the County of Rensselaer at in the City of Troy, in said county, on the day of, 192., at ten o'clock in the forenoon of that day, and attend the inquiry by the surrogate into the said objections, and show cause against the validity thereof.

And it is Further Ordered that the granting of letters testamentary under the said last will and testament of, late of the Town of Schaghticoke, deceased, be and it is hereby stayed until the day of, 192., or until the further order of the court herein.

That personal service of a certified copy of this order days before the return day thereof shall be sufficient.

Surrogate.

FORM No. 122.

Order After Hearing Objection to Granting of Letters.

[§ 96, ¶ 105]

SURROGATE'S COURT, County of

Caption.

In the matter of the objections to the grant
of letters upon the estate
of.

The objections heretofore filed by in the above-entitled matter having come on for trial, and the court having heard the evidence and duly considered the same, and having appeared by,

It is Ordered that letters be denied to, the objection that having been duly established to the satisfaction of the court.

(Or as follows):

It is Ordered that letters be granted and issued to upon his filing a bond, etc.

FORM No. 123.

Letters Testamentary.

[§§ 88, 155, ¶ 102, 77]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God, Free and Independent.

To all to whom these presents shall come or may concern, Send Greeting:

Know ye, That at a Surrogate's Court, held in and for the County of Erie and State of New York, at the Surrogate's office, in the City of Buffalo, in said

County, on the day of, one thousand nine hundred and, before Hon., Surrogate, a decree was duly made admitting to probate the Last Will and Testament of, late of the of, in said County, deceased.

And nominated and appointed Executor in said Last Will and Testament having appeared and taken the oath of office prescribed by law:

Now, Therefore, we do grant these Letters Testamentary, to the said Executor giving and granting unto power and authority to execute the provisions of said Last Will and Testament and to administer and dispose of the Estate of said deceased as required by law.

In Testimony Whereof, we have caused the seal of our said Surrogate's Court to be hereunto affixed.

Witness, Hon., Surrogate of said County, at the City of Buffalo, [L. S.] in said County, the day of, in the year of our Lord one thousand nine hundred and,

.....
Clerk of the Surrogate's Court.

FORM No. 124.

Letters Testamentary.

[§§ 88, 155, ¶¶ 102, 77]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God, Free and Independent.

To all to whom these presents shall come, or may
[L. S.] concern:

Send Greeting:

Know ye, that, at the City of Troy, in the County of Rensselaer, on the day of, in the year of our Lord, 192.., before Hon. Surrogate of Rensselaer County, the last will and testament of, late of the of, in the said county, deceased was proved and is now approved and allowed by us; and the said deceased having whilst living, at the time of h.. death, goods, chattels and credits within this State, by means whereof the proving and registering the said will, and granting administration of all and singular the said goods, chattels and credits, and also the auditing, allowing and finally discharging the account thereof doth belong to us; the administration of all and singular the goods, chattels and credits of the said deceased, and in any way concerning h.. will, is granted unto, execut.. in the said will named having first taken and subscribed an oath as required by statute, faithfully and honestly to discharge the duties of such execut.. (and having also filed a bond as required by this court) hereby requiring you, the said, execut.., to make, or cause to be made, a true and

perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or will come to your hands, possession or knowledge; as also to make, or cause to be made, duplicates of such inventory, and cause the same to be signed by the appraisers, and the same so made and signed that you make return thereof to the surrogate of said county, within three months from the date hereof.

In Testimony Whereof, we have caused the seal of office of our said Surrogate to be hereunto affixed.

Witness Hon,, Surrogate of the said County of Rensselaer, at his office in the city of Troy, in said county, the day of..... in the year of our Lord, 192..

.....
Surrogate.

FORM No. 125.

Petition for Letters of Administration with the Will Annexed.

[§ 133, ¶ 91.]

SURROGATE'S COURT, County of Bronx.

In the matter of the application for letters of administration with the will annexed on the goods, chattels and credits left unadministered which were of.....
Deceased.

To the Surrogate's Court of the County of Bronx:

The petition of respectfully shows: That your petitioner is a resident of No., in the Borough of The Bronx, and is named in the last will and testament of deceased, and is of full age.

That said deceased departed this life at on the day of '....., 192.., and was at or immediately previous to h.. death a resident of the County of Bronx.

That said deceased left a last will and testament, in and by which w..... appointed execut.... thereof, who duly qualified.

That the said last will and testament was duly admitted to probate by the Surrogate's Court of the County of Bronx on the..... day of, 192.., and was recorded in liber..... of wills, at page

That the said execut.... h.... departed this life, (is incompetent, has resigned or been removed), leaving certain property and assets of the said testat.... unadministered the value of which does not exceed the sum of dollars.

That the names and post-office addresses of the residuary, principal or specific legatees, husband, wife, next of kin, heirs and devisees and creditors, of said deceased, qualified to act as administrators, as far as they are known to your petitioner, or can be ascertained by h.... with due diligence, are as follows:

Name	Relationship.	Post-office Address.	Age.
.....			

That there are no other persons than those hereinbefore mentioned, interested in this proceeding.

Your Petitioner therefore prays for a decree of the Surrogate's Court of the County of Bronx, awarding letters of administration with the will annexed of the goods, chattels and credits left unadministered which were of said deceased, to h..., and that all the persons having a prior or equal right, who have not renounced, be cited to show cause why such letters of administration should not be granted to your petitioner.

Dated the day of, 192..

.....
Petitioner.

Verification and oath of office.

FORM No. 126.

Petition for Letters of Administration with Will Annexed.

[§ 133, ¶ 91]

SURROGATE'S COURT, Rensselaer County.

<p>In the matter of the application for letters of administration with the will annexed of the goods, chattels and credit of..... Deceased.</p>

To the Surrogate's Court of Rensselaer County:

The petition of of the of and State of, shows to the court as follows: That the will of, late of the of, in the County of and State of, was duly admitted to probate by a decree of this court rendered on the day of, 192..

That (here state that no executor was named in the will—or being so named has died, or has refused to qualify or has been excluded—or that all the executors have died since entering upon the discharge of their duties).

That the value of the personal property, of which the said testat.... died possessed (or which remains unadministered, as the case may be), together with

the probable amount to be recovered by reason of any right of action granted to his executor or administrator by special provision of law, and the value of the real property, or of the proceeds thereof, which may come to the hands of such executor or administrator by virtue of provisions contained in the will, do not, in all, exceed the sum of dollars. That your petitioner is over the age of twenty-one years (here state claim of petitioner to priority or equality of right to letters).

That said (here state names and interest of all parties having priority or equality of right to letters).

Wherefore, your petitioner prays that a decree may be made by this court, granting letters of administration with the will annexed of the goods, chattels and credits of the said testat.... to your petitioner; and that all the persons having a prior right to such administration may be cited to show cause why such letters should not be granted.

Dated, Troy, N. Y.,, 192..

.....

(Add verification.)

(Add oath of proposed administrator.)

NOTE.—Add any necessary allegation required by § 51, ¶ 25.

FORM No. 127.

Bond of Administrator with Will Annexed.

[§ 135, ¶ 91]

Usual Form down to "Condition" and then add.)

The condition of this obligation is such that if the above bounden as administrat..., with the will annexed of all and singular the goods, chattels and credits of, deceased, shall faithfully discharge the trust reposed in as such, and also that will obey all lawful decrees and orders of the Surrogate's Court of the County of Rensselaer touching the administration of the estate committed to then this obligation to be void, otherwise to be of force.

Sealed and delivered in }
the presence of }

..... [L. S.]
..... [L. S.]
..... [L. S.]

(Continue with justification of sureties and acknowledgment.)

FORM No. 128.

Letters of Administration with the Will Annexed.

[§ 88, ¶ 102]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God Free and Independent.

To all to Whom these Presents Shall Come or May Concern, Send Greeting:

Know ye, That at a Surrogate's Court, held in and for the County of Erie and State of New York, at the Surrogate's Office, in the City of Buffalo, in said County, on the day of one thousand nine hundred and, before Hon., Surrogate, a decree was duly made admitting to probate the Last Will and Testament of, late of the of in the said county, deceased, and the executor named in said will having and Hon., Surrogate, having on this day made a decree awarding letters of administration with the will annexed to

And the said administrators having taken the oath of office and executed a bond as required by the decree and filed the same with the clerk of said court.

Now, Therefore, we do grant these Letters of Administration, with the Will Annexed, to you the said administrators giving and granting unto you power and authority to administer and dispose of the Estate of said deceased as required by law.

In Testimony Whereof, We have caused the seal of our said Surrogate's Court to be hereunto affixed.

Witness, Hon., Surrogate of said County, at the City of Buffalo, in said County, the day of in the year of our Lord one thousand nine hundred and

.....
Clerk of the Surrogate's Court.

FORM No. 129.

Letters of Administration with the Will Annexed.

[§ 88, ¶ 102]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God, Free and Independent.

To Send Greeting:

Whereas, the last will and testament of, late of the of, in the County of Rensselaer, deceased, was on the day of, in the year 19.., duly admitted to probate by the Surrogate's Court of said County.

And whereas has (died, resigned, been removed) leaving certain assets and property which were of said, deceased, unadministered, by means whereof the ordering and granting administration of all and singular the goods, chattels and credits, whereof the said testat.. died possessed, in the State of New York, and also the auditing, allowing and final discharging the account thereof, doth appertain unto us; and we, being desirous that said will should be observed and performed, and that the goods, chattels and credits of said testat.... should be well and faithfully administered, applied and disposed of, do grant unto you the said full power and authority by these presents to administer and faithfully dispose of all and singular the said goods, chattels and credits, and to ask, demand, recover and receive the debts which unto the said testat...., whilst living and at the time of h.. death, did belong, and to pay the debts which said testat.... did owe as far as such goods, chattels and credits will thereunto extend, and the law require, hereby requiring you to observe and perform the said last will and testament, and to observe and perform all the duties to which you would have been subject if you had been named execut..... thereof. And we do, by these presents, depute, constitute and appoint you, the said, administrat...., with the will annexed of all and singular the goods, chattels and credits, which were of the said, deceased.

In Testimony Whereof, We have caused the seal of office of our said Surrogate's to be hereunto affixed.

Witness, Hon., Surrogate of the said County of Besselaer,
[L. S.] at his office in the City of Troy, in said county, the day of
....., in the year of our Lord, 192..

.....
Surrogate.

FORM No. 130.

Petition for Ancillary Letters Testamentary.

[§ 162, ¶ 112]

SURROGATE'S COURT, County of New York.

<p>In the matter of the application for ancillary letters testamentary on the last will and testamentary of, late of, State of Deceased.</p>
--

To the Surrogate's Court of the County of New York:

The petition of, residing at, State of, respectfully sheweth that your petitioner is of said deceased.

That said deceased was at the time of h... death a resident of, State of, and departed this life in, State of, on the day of, 192.., having personal property within this county

That heretofore (i. e., on the day of, 192..) a will of personal property, made by said deceased, was duly admitted to probate bya competent court within the State of where the decedent so resided as aforesaid, and the said will was executed

That the said will is filed and recorded in the, the same being the proper office therefor, as prescribed by the laws of said State of, and the said will, with the proofs and the records thereof, remain in said court

That on the day of, 192.., letters testamentary upon the estate of said deceased were duly issued by said court to as, execut..., named in said will

That an exemplified copy of the will, and of the judgment, decree or order so admitting the same to probate as aforesaid, and also of the said letters, is hereto annexed

That petitioner has made diligent search as follows, to wit, by to discover whether any creditors or persons claiming to be creditors of the decedent reside within this State and he is also familiar with the financial affairs of the decedent, and he knows of his own knowledge that there are no creditors of the decedent within the State of New York, except

That the amount of security given on the original appointment was

That the amount of personal property in this State left by the decedent does not exceed in value dollars.

That no previous application for ancillary letters has been made in this or any other Surrogate's Court of this State.

That the following is a true and correct statement of all of the decedent's property in the State of New York and of the value thereof

Your petitioner therefore prays that the said Surrogate issue a citation according to law, record said exemplified copies, and issue thereupon ancillary letters to upon h.... qualifying as prescribed by law

Dated, New York City,, 192..

.....,

Petitioner.

(Add verification.)

FORM No. 131.**Consent by Principal Executors to Grant of Letters.**

We, the undersigned,, of, both in the County of Norfolk, in the Commonwealth of Massachusetts, being all of the qualified and acting executors of the last will and testament of, late of Boston, County of Suffolk, and Commonwealth aforesaid, deceased, do hereby authorize, of the City and State of New York, to petition for and receive, within the State of New York, ancillary letters testamentary under the said last will and testament of, deceased, pursuant to the laws of the State of New York in that behalf provided.

In Witness Whereof, we have hereunto set our hands and seals, this day of, 192..

.....,
.....,

Executors.

(Acknowledgment.)

FORM No. 132.**Waiver of Notice by Comptroller.**

[§ 162, ¶ 112]

SURROGATE'S COURT, County of Rensselaer.

In the matter of the granting of ancillary letters testamentary on the estate of, late of Pawlet, Vt.,	} Deceased.

The undersigned, the Comptroller of the State of New York, does hereby waive the issue and service of the usual citation by law in this matter, and I hereby consent that ancillary letters testamentary may be granted to by the Surrogate's Court of Rensselaer County, at the City of Troy and State of New York, without further notice to me.

Sealed with my seal and dated this day of, 192..

[L. S.]

.....,
Deputy Comptroller.

(Add acknowledgment.)

Where citation is issued directed to the creditors as unknown persons it is published under an order for service by publication. § 56.

FORM No. 133.**Oath of Ancillary Executor.**

SURROGATE'S COURT, County of Rensselaer.

In the matter of the application for ancillary letters testamentary upon the estate of <div style="text-align: right;">Deceased.</div>	}
---	---

STATE OF NEW YORK, County of New York.	}	ss.:
---	---	------

I,, of the City of New York, do solemnly swear that I am a resident of New York City, in the State of New York, and over twenty-one years of age; and that I will well, faithfully and honestly discharge the duties of ancillary executor under the last will and testament of the above-named decedent.

.....

Sworn to before me this day of, 192..	}
---	---

.....,

Notary Public, New York County.

Obligation of Bond of Ancillary Executor.

The condition of this obligation is such, that if the above bounden shall faithfully execute the trust reposed in him as ancillary executor of all and singular the goods, chattels and credits of, late of Boston, Commonwealth of Massachusetts, deceased, and obey all lawful decrees and orders of the Surrogate's Court of the County of Rensselaer, touching the administration of the estate committed to him, then this obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of	}
--	---

FORM No. 134.

Decree Appointing Ancillary Executor.

[§ 163, ¶ 113]

At Chambers of the Surrogate's Court in and for the
County of New York, at the Surrogate's Office in the
Borough of Manhattan in the City of New York, on
the day of, in the year nineteen
hundred and twenty-.....

Present: Hon., Surrogate.

<p>In the matter of the application for ancillary letters testamentary on the last will and testament of late of, State of</p>	}	<p>Deceased.</p>
--	---	------------------

A copy of the record of the will of, late of the
of, and State of, deceased, and of the judgment,
decree or order of the Court of within said State,
entered the day of, 19.., duly admitting the same to probate
(and of the letters testamentary issued thereon to the execut...
in said will named) authenticated as prescribed by statute, having been filed
in this court on the day of, 19.., (together with an instru-
ment duly executed by the said authorizing to
receive ancillary letters testamentary upon the estate of said)
and the said having therewith presented to and filed in this court
h.... verified petition praying for a decree awarding to h.... ancillary letters
testamentary on said will, and the Surrogate having ascertained, to his satis-
faction, that there are no creditors or persons claiming to be creditors of the
said decedent residing within the State of New York,

Now, on motion of attorney.. and counsel for said

It is Ordered and Decreed, That said will and letters be recorded and that
ancillary letters testamentary on said will of, deceased, issue
to the said upon h.... taking and subscribing the statutory oath
or affirmation.

.....,

Surrogate.

Note.—Provide for bond when one is required.

FORM No. 135.

Decree Appointing Ancillary Executor.

[§ 163, ¶ 113]

At a Surrogate's Court held in and for the County of Rensselaer, at the Surrogate's Office, on the day of, 192..

Present: Hon., Surrogate.

In the matter of the application for ancillary letters testamentary upon the estate of, <div style="text-align: right;">Deceased.</div>	}
--	---

An exemplified copy of the record of the will and codicils thereto of
, late of Pawlet, State of Vermont, deceased, and of the decree of
 the Probate Court for the District of Fair Haven of said State, entered on the
 day of, 192.., admitting the same to probate and of letters
 testamentary issued thereon to, the executor named in said will
 and codicil thereto, having been filed in this court on the day of,
 192.., and the said having thereafter presented and filed in this
 court his duly verified petition praying for a decree that ancillary letters testa-
 mentary on said will and codicils of said be awarded to him, and
 the Surrogate ascertained to his satisfaction after due publication of citation
 that there are no creditors or persons claiming to be creditors of the said
 deceased residing within the State;

It is Ordered, Adjudged and Decreed, that ancillary letters testamentary on
 said will and codicils thereto issue to the said, he having taken
 and subscribed the statutory oath or affirmation. It is further directed that
 the said as such ancillary executor, upon paying the transfer tax
 levied by the State of New York against the property of the decedent in this
 State, and filing a receipt of the Comptroller of the State of New York, therefor
 in this court and upon paying the balance of said estate over to the executor
 of the last will and testament and codicils thereto of said, in the
 State of Vermont, and filing in this court the receipt therefor duly acknowl-
 edged, shall be discharged from any further liability in this matter.

In Witness Whereof, I have hereunto set my hand and seal and the seal
[L. S.] of this court the day and year first above written.

.....,

Surrogate.

NOTE.—The last part of the Order permits the discharge of the executor without final accounting upon his filing the proper release. Unless this is contained in the Order an accounting must be had.

Where citation has been published (§ 163) the order may recite such publication and dispense with a bond or in part. If citation addressed to all creditors residing within the State has not been published a bond may or may not be required in the discretion of surrogate.

FORM No. 136.

Ancillary Letters Testamentary.

THE PEOPLE OF THE STATE OF NEW YORK,

To all to Whom These Presents Shall Come, or Whom They May Concern,
Send Greeting:

Know Ye, That on the day of, in the year of our Lord one thousand nine hundred and, the Last Will and Testament of, late of, deceased, was duly admitted to probate by the, a competent court within the State of, where the said will was executed and the said resided at the time of death, and letters testamentary thereon were by said court duly issued to and the said will was, together with the said letters, duly filed and recorded in and by our Surrogate's Court of the County of Bronx, upon an application duly made for that purpose, accompanied by a duly exemplified and authenticated copy of the said will and of said letters and of the of the said court, admitting said will to probate and of said letters, and the said having died, leaving personal property within the County of Bronx, by means whereof the filing and recording of said will and the granting administration of all and singular the goods, chattels and credits of the said testat.... and also the auditing, allowing and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattels and credits of the said deceased, and any way concerning will, is granted unto the said, execut.... in the said will named, being first duly well, faithfully and honestly to discharge the duties of ancillary executor.

In Testimony Whereof, We have caused the seal of the Surrogate's Court to be hereunto affixed.

Witness, Hon., Surrogate of our said County of Bronx,
the day of, in the year of our Lord one thousand
nine hundred and twenty.

.....,

Clerk of the Surrogate's Court.

FORM No. 137.**Granting of Ancillary Letters of Administration.**

The same forms used in regard to ancillary letters testamentary may be readily adapted to cases of administration.

Bond on Grant of Ancillary Letters of Administration.

[§ 163, ¶ 113]

Know all Men by these Presents, That we,, of Spokane, Washington, as principal, and the Surety Company of New York, having an office and principal place of business at No. 100 Broadway, in the City of New York, as surety, are held and firmly bound unto the People of the State of New York in the sum of two hundred (\$200) dollars, lawful money of the United States of America, to be paid to the said People, to which payment well and truly to be made we bind ourselves, our and each of our heirs, executors and administrators, and the said company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the day of, one thousand nine hundred and twenty-.....

The condition of this obligation is such, that if the above-bounden shall faithfully execute the trust reposed in her as ancillary administratrix of all and singular the goods, chattels and credits of, late of Spokane, Washington, deceased, and obey all lawful decrees and orders of the Surrogate's Court of the County of Rensselaer, New York, touching the administration of the estate committed to her, then this obligation to be void, else to remain in full force and virtue.

(Add acknowledgment and proof of execution.)

FORM No. 138.**Ancillary Letters of Administration.****THE PEOPLE OF THE STATE OF NEW YORK,****By the Grace of God, Free and Independent.**

To, Send Greeting:

Whereas, letters of administration upon the estate of, an intestate, were duly granted to by the Probate Court of the County of, said court being a competent court, where the said intestate resided at the time of his death, and

Whereas, the said has presented to the surrogate's court an

exemplified copy of said letters of administration, and applied for the issuance to him of ancillary letters of administration, by means whereof the ordering and granting administration of all and singular the goods, chattels and credits, whereof the said intestate died possessed in the State of New York; and also the auditing, allowing and final discharging the account thereof, doth appertain unto us, and we being desirous that the goods, chattels and credits of the said intestate, may be well and faithfully administered, applied and disposed of, do grant unto you, the said, full power by these presents to administer and faithfully dispose of all and singular the said goods, chattels and credits, and to ask, demand, recover and receive the debts which unto the said intestate whilst living and at the time of his death did belong; and to pay the debts which the said intestate did owe, as far as such goods, chattels and credits will thereunto extend and the law require; hereby requiring you to make or cause to be made a true and perfect inventory of all the goods, chattels and credits of the said intestate within a reasonable time, and return the same to our surrogate of the County of Rensselaer within three months from the date of these presents; and also to render a just and true account of your administration when thereunto required; and we do by these presents depute, constitute and appoint you, the said, ancillary administrator of all and singular the goods, chattels and credits of the said, deceased.

In Testimony Whereof, We have caused the seal of the Surrogate's Court of Rensselaer County, N. Y., to be hereunto affixed.

Witness, Hon., Surrogate of said County, at the City
[L. S.] of Troy, the day of, in the year of our Lord, one
thousand nine hundred and twenty-.....

.....,
Surrogate.

FORM No. 139.

Ancillary Letters of Administration with the Will Annexed.

THE PEOPLE OF THE STATE OF NEW YORK,

To, Send Greeting:

Whereas,, lately departed this life, having previously executed
..... last will and testament:

And Whereas, the said will has been duly admitted to probate by
a competent court within, where the said will was executed, and
the testat.... resided at the time of death;

And Whereas, has made an application to our Surrogate's Court
of the City and County of New York, a court having jurisdiction to entertain
the same for the issuance to of ancillary letters of administration
with the will annexed.

And Whereas, the said application is accompanied by an exemplified copy
of the said will and of the judgment, decree and order admitting the same to
probate, and also of the foreign letters; and we being desirous that said will

should be observed and performed, and that the goods, chattels and credits of said testat.... should be well and faithfully administered, applied and disposed of, do grant unto you the said full power and authority, by these presents, to administer and faithfully to dispose of all and singular the said goods, chattels and credits, and to ask, demand, recover and receive the debts which unto the said testat.... whilst living and at the time of death did belong, and to pay the debts which the said testat.... did owe, as far as such goods, chattels and credits will thereto extend and the law require; hereby requiring you to observe and perform the said last will and testament, and to observe and perform all the duties to which you would have been subject if you had been named execut.... thereof.

And we do by these presents depute, constitute and appoint you the said ancillary administrat.... with the will annexed, of all and singular the goods, chattels and credits which were of said, deceased.

In Testimony Whereof, We have caused the seal of office of the Surrogate's Court of the City and County of New York to be hereunto affixed.

Witness, Hon., a Surrogate of said City and County at the City of New York, this day of, in the year of our Lord, 192..

.....,
Clerk of the Surrogate's Court.

FORM No. 140.

Petition for Settlement by Ancillary Executor.

SURROGATE'S COURT, County of Rensselaer.

In the matter of the judicial settlement of the account of, as ancillary executor under the last will and testament of, <div style="text-align: right;">Deceased.</div>	}
---	---

To the Surrogate's Court of the County of Rensselaer:

The petition of of the City and County of New York respectfully shows as follows:

1., the above-named decedent, died on the 21st day of March, 1907, at the City of Boston, in the Commonwealth of Massachusetts, being at the time of his death a resident of said city and State. On the 18th day of April, 1907, the will of said decedent was duly admitted to probate at the Probate Court in and for the County of Suffolk in said Commonwealth of Massachusetts, being a court of competent jurisdiction for that purpose. On said 18th day of April, 1907, letters testamentary upon the estate of said decedent were duly issued by said Probate Court to, of the

County of Norfolk in said Commonwealth of Massachusetts, and by virtue thereof the said became and have ever since been and still are the sole executors under said will.

2. The said decedent at the time of his death had certain personal property within the County of Rensselaer in the State of New York; and thereafter such proceedings were duly had that on the day of, 192., ancillary letters testamentary under the will of said, deceased, were duly issued to petitioner by the Surrogate's Court of the County of Rensselaer, in the State of New York. Your petitioner has ever since been and still is acting as such ancillary executor.

3. Thereafter your petitioner as ancillary executor as aforesaid caused proceedings to be had for the assessment of the transfer tax upon the estate of said decedent within the State of New York and paid said transfer tax, and thereupon transmitted to, the principal executors of said will within the Commonwealth of Massachusetts as aforesaid, to be disposed of pursuant to the laws of said Commonwealth, all money and other personal property of said deceased received by or in the hands of your petitioner; and your petitioner has now no money or other property of said decedent and verily believes that there is no money or other property of said decedent within the State of New York.

4. The only persons interested in the estate of said decedent as creditors, next of kin and otherwise, and their places of residence to the best of the knowledge, information and belief of your petitioner, are as follows, to wit:

Name.	Post-Office Address.	Relationship.
Jane N. Grew	Hyde Park, Mass....	Niece.
.....
.....
.....

All of the above are of full age and sound mind. The name and residence of the surety in the official bond of your petition is National Surety Company, having an office and principal place of business at 115 Broadway, Borough of Manhattan, City and County of New York.

5. Your petitioner having to the best of his knowledge and belief collected all of the property belonging to said decedent within the State of New York and transmitted the same pursuant to statute to the principal executors of the will of said decedent in the Commonwealth of Massachusetts as aforesaid, now desires to render an account of all his proceedings to the Surrogate of the County of Rensselaer, by whom your petitioner was appointed, and for that purpose prays that a citation may issue to all persons interested in the estate of said decedent to attend a final judicial settlement of the account of the proceedings of your petitioner.

.....,
Ancillary Executor, Petitioner.

Steele, DeFries & Frothingham,

(Verification.)

Attorneys for Petitioner.

Note.—Make such additional allegations as are required in a petition.

FORM No. 141.**Waiver by Principal Executors.**

SURROGATE'S COURT, Rensselaer County.

In the matter of the judicial settlement of the
 account of, as ancillary
 executor under the last will and testament of
,
 Deceased.

We, the undersigned, and, being the sole executors of the will of the above named, deceased, duly appointed by the Probate Court in and for the County of Suffolk, in the Commonwealth of Massachusetts, hereby waive the issue and serve of a citation in the above-entitled proceeding, and approve the account rendered herein by, ancillary executor, and verified by him on the day of, 192., and consent to the entry of the decree approving and settling the same.

Dated,, 192..

Executors of the Will of Thomas Wigglesworth, Deceased.

(Acknowledgment.)

FORM No. 142.**Account of Ancillary Executor.**

SURROGATE'S COURT, County of Rensselaer.

In the matter of the judicial settlement of the
 account of, as ancillary
 executor under the last will and testament of
,
 Deceased.

To the Surrogate of the County of Rensselaer:

I,, of the City of New York, do render the following account of my proceedings as ancillary executor of the will of, late of the City of Boston, in the Commonwealth of Massachusetts, deceased.

On the day of, 192., ancillary letters testamentary under said will were duly issued to me by the Surrogate of the County of Rensselaer. I thereupon proceeded to take possession of all the personal property belonging to said decedent within the State of New York. I then took such proceedings to procure the assessment of the transfer tax upon said property within the State of New York, that on the day of, 192., an order was made by the Surrogate of the County of Rensselaer assessing and fixing the

amount of said transfer tax; and I thereafter paid the tax so assessed and fixed to the Comptroller of the State of New York. I then transmitted to the principal executors of said will in the Commonwealth of Massachusetts, all of the money and other personal property belonging to said estate which had been received by me or was in my hands; and I have now in my hands no money or other personal property belonging to said estate and verily believe there is no money or other personal property belonging to said estate within the State of New York. To the best of my knowledge, information and belief there are within the State of New York no creditors or other persons interested in the estate of said decedent.

Schedule A hereto annexed contains a statement of all money and other personal property within the State of New York which has come to my hands or of which I have any knowledge.

Schedule B hereto annexed contains a statement of all expenses of administration paid by me.

Schedule C hereto annexed contains a statement of all money and other personal property transmitted by me to the principal executors of said will in the Commonwealth of Massachusetts.

Schedule D hereto annexed contains the names of all persons entitled as widow, legatee or next of kin of the deceased to a share of his estate, with their places of residence and degree of relationship, none of them being minors.

I charge myself as follows:

With amount of schedule A.....	\$14,764 38
--------------------------------	-------------

I credit myself as follows:

With amount of Schedule B.....	\$750 00
With amount of Schedule C.....	14,014 38
	<hr/> 14,764 38

I make no claim in this proceeding for my commissions as ancillary executor or for any other expenses in connection with my administration.

The said schedules which are severally signed by me are part of this account.

.....
Ancillary Executor.

SCHEDULE A.

Receipts.

Sept. 27.	Received from Steele, DeFriese & Frothingham, cash in their hands.....	\$750 00
Oct.	Received 300 shares of the preferred stock of the Fitchburg Railroad Company, standing, in the name of Thomas Wigglesworth, deceased, on the books of said company. The market value of said shares at the date of the testator's death was \$131 per	

share, or a total of \$39,300; and the proportion thereof located within the State of New York was 35.66 per cent., making the total value of said stock within the State of New York.....

14,014 38

Total receipts.....

\$14,764 38

Anc. Exec.

SCHEDULE B.

Expenses of Administration.

1907.

Oct.	1. National Surety Company, premium on bond of ancillary executor	\$10 00
Dec.	7. Comptroller of the state of New York, amount of transfer tax as assessed and fixed by order of November 27, 1907, less 5 per cent. rebate.....	665 69

1908.

Feb.	7. Steele, DeFriesse & Frothingham, on account of professional service and disbursements in connection with administration	74 31
		\$750 00

Anc. Exec.

SCHEDULE C.

1908. Property Transmitted to Principal Executors.

Jan. 13. Transferred and delivered to George Wigglesworth and Henry S. Grew, executors of the will of Thomas Wigglesworth, deceased, in the Commonwealth of Massachusetts, the 300 shares of preferred capital stock of the Fitchburg Railroad Company, at the valuation thereof mentioned in Schedule A of this account, to wit.....

\$14,014 38

Anc. Exec.

SCHEDULE D.

Persons Interested in the Estate.

Name	Post-Office Address.	Relationship
Jane N. Grew.....	Hyde Park, Mass.....	Niece.
* * *	* * *	* * *

All of the above are of full age and sound mind.

.....
Anc. Exec.

(Add usual affidavit to account; § 264.)

FORM No. 143.

Decree Settling Account of Ancillary Executor.

(Caption.)

SURROGATE'S COURT, Rensselaer County.

In the matter of the judicial settlement of the
account of, as ancillary
executor under the last will and testament of
.....
Deceased.

....., the ancillary executor within the State of New York, under the last will and testament of, late of the Commonwealth of Massachusetts, deceased, having heretofore made application to the Surrogate of the County of Rensselaer for the final judicial settlement of his account as such ancillary executor, and the said ancillary executor having rendered his account under oath before the Surrogate's Court and said account having been filed, and all of the persons interested in the estate of said decedent, being of full age and sound mind, having duly appeared herein and waived the issue and service of a citation and approving said account and consenting to the entry of a decree approving and settling the same, the said surrogate, after having examined the said account and vouchers, now here finds the state and condition of the said account to be as stated and set forth in the following summary statement thereof made by the said surrogate as finally settled and adjusted by him to be a part of the decree in this matter, to-wit:

A Summary Statement of the Account of, as Ancillary Executor

Under the Will of, Deceased.

The said ancillary executor is charged as follows:

With amount of cash and other property received by him as shown

by Schedule A of said account..... \$14,764 38

The said ancillary executor is credited as follows:

With amount of expenses of administration as shown by Schedule B of said account.....	\$750 00
With amount of property transmitted by him to the principal executors of said will in the Commonwealth of Massachusetts, as shown by Schedule C of said account.....	14,014 38
	<hr/>
	\$14,764 38
	<hr/>

And it appearing that the said ancillary executor has fully accounted for all the moneys and property of the estate of said deceased which have come into his hands as such ancillary executor, and his account having been adjusted by the said surrogate, and a summary statement of the same having been made as above and herewith recorded, it is hereby

Ordered, Adjudged and Decreed, that the said account be and the same hereby is finally and judicially settled and allowed as filed and adjusted.

And it appearing also that said ancillary executor has fully distributed all of the moneys and property of said estate which have come into his hands as such ancillary executor, it is

Further Ordered, Adjudged and Decreed, that he be and hereby is discharged as ancillary executor within the State of New York, of the last will and testament of said, deceased, and freed of and from all responsibility to any person interested in said will on account of his acts and doings thereunder.

FORM No. 144.

Receipt by Principal Executors.

SURROGATE'S COURT, Rensselaer County.

In the matter of the judicial settlement of the account of, as ancillary executor under the last will and testament of,	Deceased.
---	-----------

We, the undersigned, and, sole executors of the will of, deceased, hereby acknowledge that we have received from, ancillary executor within the State of New York, of the will of said, deceased, 300 shares of the preferred stock of the Fitchburg Railroad Company standing in the name of said, deceased, on the books of said company, and valued at the date of the testator's death at \$39,300; and that we have also received from said, as ancillary executor, all of the personal estate of said decedent which has come to the

hands of said ancillary executor, or for which he is accountable; and in consideration thereof we hereby release and discharge the said as ancillary executor as aforesaid, from further liability and accountability to us in the premises.

Dated,, 192..

.....,
.....,

Executors of the Will of Thomas Wigglesworth, Deceased.

(Acknowledgment.)

FORM No. 145.

Release by Foreign Executor.

[§ 164, ¶ 114]

SURROGATE'S COURT, Rensselaer County.

<p>In the matter of the application for ancillary letters testamentary on the will and codicils thereto of,</p>	}	Deceased.
---	---	-----------

\$16,270.50.

I,, executor of the last will and testament of, late of Pawlet, Vermont, deceased, do hereby certify that, as ancillary executor of the last will and testament and codicils thereto of deceased, in the State of New York, has fully and satisfactorily accounted to me as such executor of the estate of said deceased for all the goods, chattels and credits of said deceased, held by him as such ancillary executor.

Now, therefore, in consideration of the money and property heretofore received by me and the sum of sixteen thousand two hundred and seventy and fifty one-hundredths dollars this day to me in hand paid, the receipt whereof is hereby acknowledged, I do hereby release said, ancillary executor of the last will and testament of, in the State of New York, and the surety on his official bond as such ancillary executor from any and all liability to me as such ancillary executor.

Witness my hand and seal this day of, 192..

[L. S.]

.....,

Executor of the Estate of Nancy M. Meadon, in the State of Vermont.

(Add acknowledgment.)

FORM No. 146.

Petition for Letters of Administration.

[§§ 51, 119, ¶¶ 25, 83]

SURROGATE'S COURT, County of New York.

In the matter of the application for letters of administration on the goods, chattels, and credits of	}	Deceased.
---	---	-----------

To the Surrogate's Court of the County of New York:

The petition of, of, of the County of New York,
 respectfully shows:

That, the above-named decedent, was at the time of his death a resident of, in the County of New York, and died at, on the day of, 192..

That your petitioner is of full age and is the of the deceased.

That your petitioner has made diligent search and inquiry for a will of said deceased and has not found any such will, nor has your petitioner obtained any information concerning any such will.

That a search of the records of this court shows that no application has ever been made thereto for letters of administration upon the estate of said deceased, or for the probate of a will of said deceased or for letters testamentary thereupon, and your petitioner is informed and verily believes that no such application has ever been made to the Surrogate's Court of any other County of this State.

That the said deceased died possessed of certain personal property in the County and State of New York, and that the value of all the personal property, wherever situated, of which the deceased died possessed, does not exceed the sum of dollars.

That the estimated value of the real property in this State, of which decedent died seized, is dollars.

That a right of action exists granted to the administrator of the decedent by special provision of law, the probable amount to be recovered in which cannot be ascertained and that it is impracticable to give a bond sufficient to cover the probable amount to be recovered in said action.

husband,

That said deceased left surviving a who resides at,

widow,

and the following only next of kin and heirs-at-law, whose names, degrees of relationship, post-office addresses and age are as follows:

Name.	Relationship.	Post-office Address.	Age.
.....
.....
.....

That there are no other persons than those mentioned interested in this proceeding.

That all of the above-named persons are of sound mind; and all are of full age, except

subject

That said deceased was in his lifetime a of the United States.

citizen

Your petitioner therefore prays a decree awarding letters of administration to your petitioner.

Dated, New York,, 192..

.....,

Petitioner.

(Add verification, oath of office, designation of clerk to receive process.)

FORM No. 147.

Petition for Letters of Administration.

[§§ 51, 119, ¶¶ 25, 83]

SURROGATE'S COURT, Cayuga County.

In the matter of the petition of	}
for letters of administration of, etc., of	
Deceased.	

To the Surrogate's Court of the County of Cayuga:

The petition of, of the of, in the County of Cayuga, State of New York, respectfully, sheweth:

That your petitioner is the of, late of the of, in the said County of Cayuga, now deceased; that the said deceased died on the day of, in the year of our Lord, one thousand nine hundred; that at the time of death.. he was a resident of said County of Cayuga: that your petitioner has made diligent search for a will among the business papers of said deceased, since h... death and has inquired of the members of h... family, and others most conversant with h... business affairs, concerning such will; that said deceased left no will as far as your petitioner has been able to discover. The said deceased left h... widow [husband],

who resides at, State of; and the following h... only next of kin and heirs-at-law, the degrees of relationship to the said deceased, their places of residence and post-office addresses are respectively as follows, viz.:

..... a, who resides at State of
 a, who resides at State of
 all of whom are of full age and of sound mind, except that the following-named persons are aged respectively as follows and reside with or are employed by so far as they are known to your petitioner, or can be ascertained by h... with due diligence:
 That is the public administrator (county treasurer) of County. That the whole amount of the personal property and rights of action left by the said deceased will not exceed in value the sum of dollars, as your petitioner is informed and believes, and that said deceased left real estate not exceeding in value the sum of dollars.

That cause of action exists granted to the deceased, and cause of action exists granted to h... administrator, and that it is impracticable to give a bond sufficient to cover the probable amount to be recovered.

That there are no other persons than those mentioned interested in the application or proceeding.

That no previous application has been made for the appointment of an administrator of the goods, chattels and credits of the said deceased, and no Surrogate's Court of this State has obtained jurisdiction of or over the estate of said deceased, as your petitioner is informed and believes.

Your petitioner, therefore, prays for a decree awarding letters of administration upon the estate of the said deceased to, and that the persons having a right to such administration prior or equal to that of said be cited to show the cause why such a decree should not be made.

Dated the day of, 192..

(Add verification and oath of office.)

FORM No. 148.

Process, Waiver or Renunciation to be Used with Application for Administration.

Renunciation.

I,, a, of late of the
of, deceased, do hereby renounce all rights to letters of adminis-
tration on the estate of said deceased.
Dated,, 19..

.....
.....
.....

(Add acknowledgment.)

Citation to Show Cause.

Use regular form.

Waiver of Citation.

Use regular form.

FORM No. 149.

Bond of Administrator.

[§ 121, ¶ 86]

Know all Men by these Presents, that we,, of the of
....., as principal and sureties, are held and firmly bound
unto the People of the State of New York in the penal sum of dol-
lars (\$.....), lawful money of the United States of America, to be paid
to the said People, to which payment well and truly to be made, we bind
ourselves and each of us, our and each of our heirs, executors and administra-
tors jointly and severally, firmly by these presents.

Sealed with our seals, and dated the day of, in the
year of our Lord, one thousand nine hundred twenty-.....

The Condition of this Obligation is such that if the above bounden
.....
administrat... of all and singular the goods, chattels, rights and credits which
were of, deceased, shall faithfully discharge the trust reposed in
..... as such administrat, and shall obey all lawful decrees
and orders of the Surrogate's Court of Cayuga County, touching the adminis-
tration of the estate committed to then this obligation to be void;
otherwise to remain in full force and virtue.

..... [L. S.]

Sealed and delivered in presence of

STATE OF NEW YORK, }
County of Cayuga, } ss.:

On this day of, A. D. 192.., before me personally appeared
.....
to me known to be the persons described in and who executed the foregoing bond, and severally acknowledged the execution of the same

.....,
Notary Public.

STATE OF NEW YORK, }
County of Cayuga, } ss.:

....., being duly sworn, says: he is a resident of and a
in the county of, within the State of New York, and that he
is worth the sum of \$..... over all the debts and liabilities which
....he owes or has incurred, and exclusive of property exempt by law from
levy and sale under an execution.

.....
(Surety's Signature.)

Sworn to before me this }
day of, 192.. }

.....
Notary Public.

(Repeat for second surety.)

I hereby approve of the within bond as to form, amount and manner of execution, and of the sufficiency of the sureties thereto.

.....,
Surrogate.

FORM No. 150.

Bond of Administrator.

[§ 121, ¶ 86]

Know all Men by these Presents, That we,
.....
are held and firmly bound unto the People of the State of New York in the
sum of dollars, lawful money of the United States of America,
to be paid to the said People; to which payment well and truly to be made,
we bind ourselves, our and each of our heirs, executors and administrators,
jointly and severally, firmly by these presents. Sealed with our seals.

Dated the day of, one thousand nine hundred and twenty-.....

The Condition of this Obligation is such, that if the above bounden
.....
shall faithfully execute the trust reposed in as administrat
of all and singular the goods, chattels and credits of, late of
....., deceased, and obey all lawful decrees and orders of the Sur-
rogate's Court of the County of New York touching the administration of
the estate committed to then this obligation to be void, else
to remain in full force and virtue.

Sealed and delivered in presence of

..... [L. S.]
..... [L. S.]

I know the within-named sureties to be the identical persons that they rep-
resent themselves to be, and to be responsible parties, and I believe them to be
worth at least \$..... each in good property.

STATE OF NEW YORK, }
County of New York, } ss.:

....., being duly sworn, deposes and says that he is one of the
sureties named in the annexed recognizance; that he resides at No.
..... street, in the; that he is a holder, and
that he owns the following property, consisting of.....
.....
and that the same is of the value of not less dollars, and is
subject to no incumbrance except a mortgage of.....
.....
and that there are no unsatisfied judgments or executions against him, and
that he is under no recognizance, nor is he upon any bond, undertaking or
written obligation whatever.

.....
.....
and that he is worth in good property, exclusive of property exempt by law
from levy and sale under an execution, not less than dollars over
and above all debts, liabilities and lawful claims against him, and all liens, in-
cumbrances and lawful claims upon his property.

.....,
Surety.

Sworn to before me this }
day of, 192.. }

.....
(Add other justification and acknowledgment.)

FORM No. 151.**Letters of Administration.**

[§ 120, ¶ 83.]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God, Free and Independent.

To, Send Greeting:

[L. S.]

Whereas,, late of the of, as is alleged, lately died intestate, having whilst living and at the time of h.... death, goods, chattels or credits, within this State, by means whereof the ordering and granting administration of all and singular the said goods, chattels and credits, and also the auditing, allowing and finally discharging the account thereof doth appertain unto us; and we being desirous that the goods, chattels and credits of said the deceased may be well and faithfully administered, applied and disposed of, do grant unto you, the said full power, by these presents to administer and faithfully to dispose of all and singular the said goods, chattels and credits; to ask, to demand, to recover and receive the debts which unto the said deceased whilst living at the time of h.... death did belong; and to pay the debts which the said deceased did owe so far as such goods, chattels and credits will thereto extend and the law require:

Hereby requiring you to make or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased which have or shall come into your hands, possession or knowledge; also to make or cause to be made duplicates of such inventory, and cause the same to be signed by the appraisers, and the same so made and signed that you make return thereof to the Surrogate of the County of Rensselaer within three months of the date hereof; and further to render a just and true account of your administration when thereunto required.

And we do by these presents depute, constitute and appoint you the said administrat..... of all and singular the goods, chattels and credits which were of the said, deceased.

In Testimony Whereof, we have caused the seal of office of our said Surrogate to be hereunto affixed.

Witness, Hon., Surrogate of said County of Rensselaer, at his office in the City of Troy, in said county, the day of

{L. S.], in the year of our Lord one thousand nine hundred and twenty-.....

.....

Surrogate.

FORM No. 152.**Designation of Clerk to Receive Service.**

SURROGATE'S COURT, County of New York.

In the matter of the application for letters of administration on the goods chattels and credits of	}
Deceased.	

I,, the petitioner herein for letters of administration on the goods, chattels and credits of, deceased, a resident of, do hereby designate the Clerk of the Surrogate's Court and his successor in office as a person on whom any process issuing from the Surrogate's Court of the County of New York may be made in like manner and with like effect as if it were served personally upon me, whenever I cannot be found and served within the State of New York after due diligence used. I reside at No., New York City.

(Acknowledgment.)

FORM No. 153.**Application for Appointment of Temporary Administrator after Delay in Granting Letters Testamentary or of Administration.**

[§ 126, ¶ 90]

No petition is required, but an order is made based upon an original petition for probate or for grant of letters of administration, upon notice given to such persons who have appeared. The application should be made by the usual notice of motion, giving ten days' notice unless the time be shortened by direction of the court.

ORDER.

Title.

Caption.

Application having been made in this proceeding for the appointment of a temporary administrator of the estate of on the ground that, and a notice of motion for such relief having been duly served, and having appeared by, now, on the petition, notice of motion and other papers in this proceeding,

It is ordered, that be appointed temporary administrator of the goods, chattels and credits of, late of, and that letters of temporary administration issue to him upon his filing a bond in the penal sum of \$.....

FORM No. 154.

Petition for Administration on Estate of Absentee.

[§ 126, ¶ 90]

SURROGATE'S COURT, Rensselaer County.

In the matter of awarding letters of administration of the goods, chattels and credits of
....., commonly called S. Lee,
an absentee.

To the Surrogate's Court of Rensselaer County, N. Y.:

The petition of respectfully shows:

I. That your petitioner is the only sister of the above-named; that he has no father or mother, no wife, child or descendant, or adopted child or descendant, and no brothers or descendant of deceased brothers or sisters.

II. That the said absentee resided at No. 2439 Fifth avenue, in the City of Troy, N. Y., with your petitioner, up to the day of, 1919.

III. That the said for more than a year last past has neglected his business in which he was engaged, he being a member of the firm of, carrying on a wholesale and retail drug business at the corner of Fifth avenue and Hoosick street in the City of Troy, in which business he has been engaged for upward of sixteen years; that he has refused to go to his place of business, and would not for a long time speak unless spoken to.

That on or about the day of, 1919, he went to his place of business and upon information and belief he executed a bill of sale of his interests in the said business of to, his partner, and for which he was to receive the sum of two thousand five hundred dollars (\$2,500), and upon information and belief a check for two thousand dollars (\$2,000) and a promissory note for five hundred dollars (\$500) in payment of his said interests in said firm was made out in his favor and signed by the purchaser of his said interests, and the said took the promissory note with him and was to call for his said check of two thousand dollars (\$2,000) on the day of, 1919, but up to the present time has never called for the same.

IV. That about 1 o'clock on the morning of, 1919, he left his said residence at No. 2439 Fifth avenue in the said City of Troy, N. Y., without telling your petitioner or any other member of her household where he intended to go; that since the day of, 1919, your petitioner has received no communication from the said by mail or otherwise, and has no information as to his present whereabouts if living; that your petitioner has caused a diligent search to be made for the present abode of the said through the Chief of Police of the City of Troy, N. Y.,

who has sent communication to all of the chiefs of police within a radius of one hundred miles or more of the said City of Troy, and there is reason to believe that the said is dead or has become a lunatic and is confined in some institution unknown to your petitioner.

V. That there is now on deposit in the Security Trust Company of Troy, N. Y., a small deposit, and his interest in the firm of, the real value of which your petitioner is unable to determine, but if the said interest is correctly valued in the check and note made payable to the said for his interest in the said firm of and which check is still in the possession of the alleged purchaser of his said interest then the said value is about two thousand five hundred dollars (\$2,500).

That it is very necessary that some one should be appointed temporary administrator of the assets of said for the purpose of collecting his said personal assets to the end that they can be preserved and secured for the benefit of said

VI. That your petitioner has to the best of her ability estimated the value of the personal property in this State belonging to the said and that the same does not exceed the sum of two thousand five hundred dollars (\$2,500).

Wherefore, your petitioner prays that a decree be made by this court appointing your petitioner the administrator of the goods, chattels and credits of the said, and that, of the City of Troy, N. Y., may be joined with her as coadministrator.

Dated,, 1919.

.....

(Add verification and oath.)

NOTE.—As the facts stated above are not sufficient to authorize grant of letters of administration since there would be no proof of death, temporary letters must issue

(Add any necessary allegations required by section 51, paragraph 25.)

FORM No. 155.

Letters of Temporary Administration.

[§ 126, ¶ 90]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God, Free and Independent.

To,

Send Greeting:

Whereas, a written instrument, purporting to be the last will and testament of, late of the of, in the County of

Rensselaer, deceased, has been presented for probate before the Surrogate's Court of the said County of Rensselaer:

And Whereas,, and a delay is thereby necessarily produced in granting letters testamentary or of administration upon the estate of said deceased:

Know ye, that we, being desirous that the goods, chattels and credits of said deceased may be collected and preserved, do grant unto you, the said full power and authority, by these presents, to take into your possession the personal property of said deceased, and to secure and preserve it with all the power and authority conferred upon you by law, hereby requiring you to render a just and true account of your administration as such temporary administrat.... whenever required by our said surrogate, and faithfully to deliver up the goods, chattels and credits of said deceased to any person or persons who shall be appointed execut.... of the will of the said, deceased, or administrator of such estate, or to such other person as shall be authorized to receive the same by said surrogate.

In Witness Whereof, we have caused the seal of office of our said Surrogate's Court to be hereunto affixed.

Witness, Hon., Surrogate of the County of Rensselaer, at his office in the City of Troy, on the day of, in the year one thousand nine hundred and twenty-.....

.....,
Surrogate.

NOTE.—If temporary administration is to be granted on account of absence, insert after "Whereas" as follows: The whereabouts of are unknown and can not after due diligence used be ascertained, and it is not known whether he be dead or alive."

FORM No. 156.

Petition for Letters of Administration De Bonis Non.

[§ 136, ¶ 92]

SURROGATE'S COURT, County of Rensselaer.

In the matter of the application for letters of
administration de bonis non of.....
Deceased.

To the Surrogate's Court of Rensselaer County, New York:

The petition of respectfully shows: That your petitioner is a resident of No. in of, N. Y., and is the of the said, deceased, and is of full age; that said deceased departed this life at the of, N. Y., on the day of, 19...

That letters of administration upon the goods, chattels and credits of said deceased, were duly granted by the Surrogate of Rensselaer County, New York, on the day of, 19..., unto who has since died, and who died on the day of, 19.., leaving certain property and assets of the said, deceased, still unadministered.

That the following-named persons, so far as they are known to or can be ascertained by your petitioner with due diligence, are the only next of kin and (widow or husband) of the said decedent, h.. surviving, and that their relationship, ages and places of residence, are as follows:

Name.	Relationship.	Age.	Residence.
.....
.....

That the value of all the personal property, wherever situated, of which the decedent died possessed was dollars, and the portion thereof still remaining unadministered does not exceed dollars.

Wherefore, your petitioner prays for a decree awarding letters of administration de bonis non upon the estate of said decedent, to your petitioner, and that such person, having a right to such letters, prior or equal to that of your petitioner as this court may direct, be cited to show cause why such a decree should not be made, and that all such process and proceedings may be had and taken in this proceeding, to the end that letters of administration de bonis non be granted upon the estate of said decedent as the law may require.

Dated at, this day of, 19..
.....,
Petitioner.

(Add verification and oath.)

NOTE.—Insert any necessary allegation contained in § 51, ¶ 25.

FORM No. 157.

Petition for Letters of Administration De Bonis Non.

[§ 136, ¶92]

SURROGATE'S COURT, County of New York.

In the matter of the application for letters of
administration on the goods, chattels and
credits left unadministered of
Deceased.

TO THE SURROGATE'S COURT of the County of New York:

The petition of respectfully shows:

That your petitioner is a resident of No., in the and is the of the said deceased, and is of full age; that

said deceased departed this life on the day of 1....; that letters of administration upon the goods, chattels and credits of deceased, were duly granted by the Surrogate of the County of New York on the day of, 19..., unto the of said deceased; that said administra... of the Estate of said deceased, has since departed this life, on the day of, 192., leaving certain property and assets of the said still unadministered; that your petitioner has to the best of h.. ability ascertained and estimated the personal estate of which the said died possessed, and the value of the same does not exceed the sum of dollars.

And your petitioner has been informed, and believes, that the said deceased left h.. surviving h.. only next of kin; that said deceased was and was at or immediately previous to death a resident of the County of New York.

Your petitioner therefore prays that a decree of the said Surrogate's Court of the County of New York issue appointing your Petitioner Administrator De Bonis Non of the goods, chattels and credits of said deceased.

(Insert any necessary allegations required by § 51.)

(Add verification and oath of office.)

Petitioner.

FORM No. 158.

Letters of Administration De Bonis Non.

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God, Free and Independent.

To, Send Greeting:

Whereas, was duly appointed the administrat... of the goods, chattels and credits of, late of the of, N. Y., deceased, and letters of administration were duly granted and issued by the Surrogate of the County of Rensselaer to the said

And Whereas, the said has since died leaving certain assets of the said intestate unadministered; and we, being desirous that the said goods, chattels and credits of the said deceased so left unadministered may be well and faithfully administered, applied and disposed of, grant unto you the said full power and authority by these presents, to administer and faithfully dispose of all and singular the said goods, chattels and credits; to ask, demand, recover and receive the debts which unto the said deceased, whilst living and at the time of h.. death, did belong and to pay the debts which the said deceased did owe, so far as such goods, chattels and credits will thereunto extend, and the law require; hereby requiring you to make or cause to be made a true and perfect inventory of all and singular the said goods, chattels and credits of the said deceased which have or shall come into your

hands, possession or knowledge. And to make or cause to be made duplicates of such inventory, and cause the same to be signed by the appraisers; and the same so made and signed, that you make return thereof to the Surrogate of the County of Rensselaer within three months of the date thereof, and further, to render a just and true account of your administration when thereunto required. And we do by these presents, depute, constitute and appoint you, the said administrat..... de bonis non of all and singular the goods, chattels and credits which were of the said, deceased, left unadministered as aforesaid.

In Testimony Whereof, we have caused the seal of office of our said Surrogate to be hereunto affixed,

Witness, Hon., Surrogate of the said County of Rensselaer, at his office in the City of Troy, in said county, the day of [L.S.], in the year of our Lord one thousand nine hundred and twenty

.....,
Surrogate.

FORM No. 159.

Petition for Limited Letters of Administration.

[§ 122, ¶ 87]

SURROGATE'S COURT, Rensselaer County, N. Y.

In the matter of awarding limited letters of administration upon the estate of, late of Deceased.

To the Surrogate's Court, County of Rensselaer:

The petition of, residing in the of in the said County of Rensselaer, respectfully shows:

That, late of the of, in said County of Rensselaer, died in said of, on or about the day of, 192..

(Continue as in regular application for letters of administration.)

That at the time of the death of said decedent there existed in his behalf a cause of action, which survives to his personal representative, for

That a right of action exists granted to the administrator of the estate of said decedent by special provision of law for

That it is impracticable to give sufficient security for the probable amount to be recovered in said action by reason of the fact that the amount of the recovery is uncertain and because the petitioner is unable to find sureties among h.. friends and acquaintances who would be willing or able to execute a bond in any substantial sum.

Wherefore your petitioner prays for a decree awarding limited letters of administration upon the estate of said decedent, to your petitioner

and that such persons, having a right to such letters prior or equal to that of your petitioner as this court may direct, be cited to show cause why such a decree should not be made, and that all such process and proceedings may be had and taken in this proceeding, to the end that limited letters of administration be granted upon the estate of said decedent as the law may require.

Dated at, this day of, 192..

.....
(Petitioner sign here.)
.....

NOTE.—Insert any requirements of § 51.
(Verification and oath.)

FORM No. 160.

Limited Letters of Administration.

[§ 122, ¶ 87]

THE PEOPLE OF THE STATE OF NEW YORK,
By the Grace of God, Free and Independent.

To, Send Greeting:

Whereas, late of the of in the County of and State of, died on the day of, 192.., intestate; and it satisfactorily appearing that a cause of action exists which may be prosecuted by the administrator of said decedent and that it is impracticable for the petitioner to give a bond sufficient to cover the probable amount to be recovered;

And Whereas, on the day of, 192.., at a Surrogate's Court held at Troy, in and for our County of Rensselaer, a decree was duly made, awarding letters of administration upon the estate of the said deceased to you; And you having taken your official oath, and duly filed with the Surrogate of our said County of Rensselaer the said oath, and the bond required by law;

Now, Therefore, know ye that we, having full faith and confidence in your competency, have granted, and by these presents do grant unto you, the said

the administration of all and singular the goods, chattels and credits which were of the said deceased, hereby constituting and appointing you administrator thereof; but as to the aforesaid cause of action these letters of administration are limited to the prosecution thereof, and you are hereby restrained as such administrator from a compromise of such action and the enforcement of any judgment recovered therein until the further order of the Surrogate's Court on filing satisfactory security.

Witness, Hon., Surrogate of our said County of Rensselaer,
and the seal of our said Surrogate's Court, this day of
in the year one thousand nine hundred and twenty.

.....,
Surrogate.

NOTE.—It is not necessary to name the person against whom the cause of action exists. These letters refer to a cause of action which existed before the death, as well as one accruing by the death.

FORM No. 161.

Petition to Amend Letters to Conform to Different Spellings of the
Name of Deceased.

[¶ 102]

SURROGATE'S COURT, Rensselaer County.

In the matter of proving the last will and testament of	}
Deceased.	

To the Surrogate's Court, of County of Rensselaer:

The petition of respectfully shows to the court:

That he is the executor named in the last will and testament of the above-named deceased and that letters testamentary were duly issued to him as such executor on the day of, 1920. That said letters testamentary read "Loretta Maria Lewis" instead of Lauretta M. Lewis or Lauretta Maria Lewis; that the true name of the deceased was Lauretta Maria Lewis, as shown by the signature to the will of deceased proven in this court; that the said deceased had money deposited in several banks in the City of Albany and the City of New York at the time of her decease, and that money so deposited were in the name of Lauretta M. Lewis in each of the banks; that he as such executor has made an attempt to transfer the said accounts to his name as executor, and that the officers in the aforesaid banks refused to transfer such accounts under the certificates from the Clerk of the Surrogate's Court which were presented by

this deponent as such executor, which certificates read "Executor of the Last Will and Testament of Loretta Maria Lewis."

Wherefore, this petitioner prays that an order of this court may be entered amending said letters testamentary so as to read "Lauretta Maria Lewis, sometimes known as Lauretta M. Lewis."

Dated, Troy, N. Y.,, 1920.

Petitioner.

(Add verification.)

FORM No. 162.

Order Amending Letters.

[¶ 102]

At a Surrogate's Court held in and for the County of Rensselaer,
at the Surrogate's Office in the City of Troy, on the
day of, 192..

Present: Hon., Surrogate.

SURROGATE'S COURT, Rensselaer County.

In the matter of proving the last will and testament of	}	Deceased.
--	---	-----------

Upon reading and filing the petition of, as executor of the last will and testament of the above-named deceased, praying that the letters testamentary heretofore issued under the will of said deceased be amended so as to read "Lauretta Maria Lewis, sometimes known as Lauretta M. Lewis."

It is Ordered, that the letters testamentary so issued shall be amended to read "Lauretta Maria Lewis, sometimes known as Lauretta M. Lewis."

.....
Surrogate.

FORM No. 163.

Petition to Revoke Letters (General).

[§ 99, ¶ 106]

Title.

To the Surrogate's Court, of the County of Rensselaer:

The petition of A. B., residing in the Town of H. in said county, respectively shows: That the will of C. D., late of the Town of H. in said county, has been

duly proved in this Surrogate's Court and that letters testamentary were duly issued thereon to E. F. on or about the day of, 192.., who duly qualified and is acting thereunder. (Or state facts regarding grant of letters of administration or guardianship)

That your petitioner is interested in the estate of the said deceased by reason of the following facts: (Here state facts showing interest.).....

That the said letters issued as aforesaid to the said E. F. should be revoked for the following reasons: (Here set forth the reasons for the application as set forth in section 99 of the Surrogate's Court Act and the facts concerning the same.)

That there is no other person interested in this application.

Wherefore, your petitioner prays, that an order of this court may be made revoking the said letters heretofore issued and that a citation may issue to the said to show cause why said letters should not be revoked (or why he should not be removed as).

(Add verification.)

NOTE.—This same form may be adapted to a proceeding to revoke letters issued to an administrator or guardian, or to remove a trustee.

FORM No. 164.

Order Suspending the Powers of Respondent.

[§ 100, ¶ 106]

Title.

Caption.

Application having been made by the petition of praying for the revocation of letters of, heretofore issued to, and a citation to show cause having been issued to such respondent returnable in this court on the day of, 192.., and it appearing that it is for the interest of the of that the exercise of the powers and authority of the respondent under said letters be suspended during the pendency of the proceeding, and (recite appearances).

It is Ordered, that the powers and authority of as be and they hereby are suspended until the further order of this court in this proceeding.

FORM No. 165.**Proceeding by Surety to be Released.**

[§ 158 Civ. Pr. A., ¶ 121]

Upon application by notice of motion and affidavits made by a surety, the Surrogate's Court may require the principal in a bond to file a new bond, or new surety, and to render an account; or the court may revoke the letters.

SURROGATE'S COURT, County of Rensselaer.

(Title.)

Take notice, that upon the annexed affidavits of, verified the day of, 192.., the undersigned will move this court at a term thereof, for the hearing of motions to be held at the County Court House in the City of Troy, on the day of, 192.., at 10 o'clock a. m. or at the opening of court, or as soon thereafter as counsel can be heard, for an order relieving The Surety Company of New York from further liability as surety for your acts or omissions as administratrix c. t. a. of, deceased, and directing that you be required to furnish new surety or sureties and account as such administratrix c. t. a., in conformity with section 158 of the Civil Practice Act and for such other and further relief as to the court may seem just.

Dated, New York City,, 192..

.....,

Attorney for Petitioner,

THE SURETY COMPANY OF NEW YORK,

.... Liberty Street,

Borough of Manhattan,

New York City.

To,

219 East 52d street,

New York City.

FORM No. 166.**Order to File New Bond and to Account; or that Letters be Revoked.**

[§ 158 Civ. Pr. A., ¶ 121]

At a term of the Surrogate's Court, held in and for the
County of Rensselaer, in the City of Troy, New York,
on the day of, 192..

Present: Hon., Surrogate.

<p>In the matter of the application of the Surety Company of New York to be released from responsibility on ac- count of any future breach of the condi- tion of the bond of as admin- istratrix c. t. a. of, Deceased.</p>	}
---	---

A motion having been heretofore made by The Surety Company of New York, for an order relieving the said Surety Company of New York from further liability as surety for the acts or omissions of, as administratrix c. t. a. of, deceased, and that the said be required to furnish new surety or sureties, and to account as such administratrix c. t. a. in conformity with section 158 of the Civil Practice Act, and the court having read and filed the notice of motion of The Surety Company of New York and the affidavit of, verified the day of, 192.., showing due and timely service of a copy of the said notice of motion on the said, and said motion having come regularly on to be heard on the day of, 192.., and after hearing, of counsel for the said Surety Company of New York, the applicant herein in support of said motion and no one appearing in opposition thereto and due deliberation having been had, it is, on motion of, attorney for The Surety Company of New York,

Ordered, that the said, as administratrix c. t. a. of, deceased, file with this court within five days after the entry of this order, a new bond in the sum of five thousand two hundred (\$5,200) dollars, conditioned for the faithful discharge of her duties as such administratrix c. t. a., said bond to be approved as to form and sufficiency by this court, and upon the filing of said new bond that a decree be entered without further notice to the said, releasing the said The Surety Company of New York from liability upon the bond of said as such administratrix c. t. a. as aforesaid, for any subsequent act, neglect or default of the said and directing the said to render and settle her account as such administratrix c. t. a. to and including the date of such decree

and to file such account within twenty days after the entry and service of a copy of said decree, and it is

Further Ordered, that unless the said file such bond with such surety or sureties hereinbefore specified, a decree be entered without further notice to her revoking and cancelling the appointment of said as such administratrix c. t. a. and requiring her to account as such administratrix c. t. a. and file such account within twenty days after the entry and service of a copy of said decree.

.....,
Surrogate.

FORM No. 167.

Order Revoking Letters.

[§ 158 Civ. Pr. A., ¶ 121]

At a term of the Surrogate's Court, held in and for the
County of Rensselaer, in the City of Troy, New York,
on the day of, 192..

Present: Hon., Surrogate.

In the matter of the application of The
..... Surety Company of New York
to be released from responsibility on ac-
count of any future breach of the condi-
tion of the bond of as admin-
istratrix c. t. a. of,
Deceased.

Upon reading and filing the order duly made by the above-named court in the above-entitled proceeding, on the day of, 192.., and entered and filed in the office of the clerk of said court on the same day, directing, as administratrix c. t. a. of, deceased, to file a new bond in the sum of five thousand two hundred (\$5,200) dollars, with this court within five days after the entry of said order conditioned for the faithful discharge of her duties as such administratrix c. t. a. and in case of the failure of the said to file such new bond within the time hereinbefore specified, a decree be entered without further notice to her revoking and cancelling the appointment of the said, and to file such account within twenty days, and upon certification of the clerk of the Surrogate's Court of Rensselaer County, proving to my satisfaction that no bond has been filed herein pursuant to said order, now, on motion of, attorney for The Surety Company of New York, the applicant herein, it is

Ordered, that the appointment of, as administratrix c. t. a. of, deceased, be and it hereby is revoked, and it is

Further Ordered, that said account for all her acts and proceedings as administratrix c. t. a. of, deceased, to and including the date of this decree, and file such account with the clerk of this court within twenty days from the entry and service of a copy of this decree.

.....,
Surrogate.

FORM No. 168.

Order Granting Letters on Modified Security After Publication of Notice.

[§ 121, ¶ 86]

At a Surrogate's Court held in and for the County of Albany, at the County Building, in the City of Albany, on the day of, 192..

Present:, Surrogate.

In the matter of the awarding letters of administration on the estate of
Deceased.

On reading and filing the duly verified petition of and, sole heirs-at-law and next of kin of, deceased, late of the City of Albany, County of Albany, State of New York, deceased intestate, praying that letters of administration of all and singular the goods, chattels and credits of the said deceased be granted to and,

And it appearing that due notice requiring the creditors to present their claims to the Surrogate of Albany County on or before, 192.., was duly published pursuant to section 121 of the Surrogate's Court Act in the and in the, being papers published in, once a week for four weeks; and that each of said publications commenced at least thirty days prior to, 192..

And on reading and filing the written consent of all the next of kin, duly verified, pursuant to section 121 of the Surrogate's Court Act,

And on reading and filing the bond executed by and, with two competent sureties, in the amount of five thousand dollars, and the court being satisfied that and are in all respects competent to act as the administratrices of the goods, chattels and credits of the said deceased, it is,

Ordered and Decreed, that the prayer of the said petitioners be granted and that letters of administration issue to the said and, they having taken the required oath.

.....,
Surrogate.

Notice to Creditors.

Notice is hereby given that the undersigned intend to apply for letters of administration pursuant to section 121 of the Surrogate's Court Act; and further notice is hereby given to all persons having claims or demands against, late of the City of Albany in said county, deceased, that they are required to exhibit the same, with vouchers in support thereof, to, Surrogate of Albany County, at the Court House, Albany, New York, on or before the day of, 192..

.....
.....

FORM No. 169.

Uniform Bond to be Used by Surety Company.

Know All Men by These Presents, That we administrat..., residing in the of, N. Y., as principal, and the a corporation duly authorized by the laws of the State of New York to execute bonds of suretyship and having an office and principal place of business for the State of New York at No. in the City of, N. Y., as surety, are held and firmly bound to the people of the State of New York in the sum of dollars, lawful money of the United States of America, to be paid to the said people; for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these present.

Sealed with our seals. Dated, the day of, one thousand nine hundred and twenty.

The condition of this obligation is such, that if the bounden shall faithfully execute the trust reposed in as administrat.... of all and singular the goods, chattels and credits of, late of the of, N. Y., deceased, and obey all lawful decrees and orders of the Surrogate's Court of the County of, New York, touching the administration of the estate committed to then this obligation to be void, else to remain in full force and virtue.

[L. S.] Principal.
.....
..... Surety.

STATE OF NEW YORK, }
Albany County, } ss.:

On this day of, in the year 192.. before me came, administrat....., to me known to be the individual.. described in, and who executed the within bond and ..he.. acknowledged the execution thereof.

.....

STATE OF NEW YORK, }
Albany County, } ss.:

On the day of, in the year of 19.. before me personally came, to me known, who, being by me duly sworn, did depose and say that he resided in the City of, that he is the of the, the corporation named in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720 of the New York Session Laws for the year 1893. And the said further said that he was acquainted with and knew him to be the of said company; that the signature of the said subscribed to the said instrument is in the genuine handwriting of the said and was subscribed by the like order of the said board of directors and in the presence of him the said
.....

FORM No. 170.

Order for Publication of Notice to Creditors (New York County).

[§ 207, ¶ 212]

At a Surrogate's Court, held in and for the County of
New York, on the day of, in the
year one thousand nine hundred and twenty.

Present: Hon., Surrogate.

In the matter of the estate of..... }
Deceased. }

On application of setting forth that appointed the of said deceased, and that desirous of giving such notice to the creditors of said deceased to present their claims as is authorized by law, and praying that the surrogate would make an order directing such notice published in such newspapers as he might deem necessary to give notice to said creditors,

It is Ordered, that said insert a notice, once in each week for six months, in the New York Law Journal and also in the requiring all persons having claims against said deceased to present the same, with vouchers thereof, to said at a place to be specified in such notice, on or before a day therein mentioned, which shall be at least six months from the day of the first publication of said notice.

.....,
Surrogate.

FORM No. 171.

Notice to Creditors to Present Claims.

[§ 207, ¶ 212]

In the matter of the estate of.....
Deceased.

In pursuance of an order of Hon., Surrogate of the County of notice is hereby given, according to law, to all persons having claims against late of the of in said county, deceased, that they are required to exhibit the same, with vouchers thereof, to the subscriber, at place of transacting business as, etc., of said deceased, at in the of on or before the day of, 192..

Dated,, N. Y.,, 192..

.....
Administrator or Executor.

In pursuance of an order of Honorable, a surrogate of the County of New York, notice is hereby given to all persons having claims against late of the County of New York, deceased, to present the same with vouchers thereof, to the subscribers, at their place of transacting business, at the office of, their attorneys, at No. street, in the Borough of Manhattan, in the City of New York, State of New York, on or before the day of, 192..

Dated, New York, the day of, 1921.

.....
Executors.

FORM No. 172.

Affidavit to Attach to Claim Before Presenting.

[§ 207, ¶ 212]

STATE OF NEW YORK, }
County of Rensselaer, } ss.:

..... of the of in said county, being duly sworn, says the annexed claim against, deceased, is justly due and owing to from the estate of said deceased, that no payments have been made thereon, and that there are no offsets against the same to the knowledge of this deponent.

Sworn to before me this }
day of, 192.. }

.....
.....

FORM No. 173.**Order Appointing Appraisers.**

At a Surrogate's Court, held in and for the County of Erie,
New York, in the City of Buffalo, in said County, on
the day of, 192..

Present: Hon., Surrogate.

_____ }
In the matter of the estate of.....,
Deceased. }

Upon the application of the of the
of late of the of in said County of
Erie, Deceased.

It is Ordered, that and two disinterested persons,
be and they are hereby appointed appraisers of the personal property of said
deceased.

.....,
Surrogate.

FORM No. 174.**Application for Appointment of Appraisers and Order.**

[§ 195, ¶ 188]

SURROGATE'S COURT, County of New York.

_____ }
In the matter of the estate of.....,
Deceased. }

To the Hon., Surrogate.

Application is hereby made by, of the estate of said deceased,
to have appraisers appointed to estimate and appraise the personal property of
said deceased, which consists of

On the foregoing application of, of the estate of said deceased,
to have two disinterested persons appointed to estimate and appraise the per-
sonal property of said deceased,

It is Ordered, that be and they are hereby appointed such ap-
praisers; and they are hereby authorized and required to truly, honestly and
impartially appraise the personal property of said deceased which shall be
exhibited to them, according to the best of their knowledge and ability.

FORM No. 175.

Notice of Appraisement.

[§ 195, ¶ 188]

To the legatees and next of kin of, deceased.

Take Notice, that the subscriber, with the appraisers duly appointed, will attend at the late dwelling-house of the said deceased in the of, in the said county, on the day of, 192., at ten o'clock in the forenoon of that day, to estimate and appraise the personal property of the said deceased, and with the aid of said appraisers take an inventory thereof.

Dated,, 192..

.....,
.....,
Executor or Administrator.

FORM No. 176.

**Inventory Containing Oaths of Appraisers—Affidavit as to Fees—
Affidavit of Representatives, etc.**

[§ 198, ¶ 190]

SURROGATE'S COURT, Rensselaer County.

In the matter of the estate of....., }
Deceased. }

This is to certify that, in pursuance of an order made by this court in the above-entitled proceeding, and were duly appointed the appraisers of the personal property of the above-named deceased.

In Witness Whereof, I have hereunto set my hand and affixed the seal [L. S.] of this court, this day of, 192..

.....,
Clerk of the Surrogate's Court.

STATE OF NEW YORK, }
Rensselaer County, (ss.:

I,, duly appointed one of the appraisers by the Surrogate's Court of the said County of Rensselaer, do swear that I will truly, honestly and impartially appraise the personal property of, the above-

named deceased, which shall be exhibited to me, according to the best of my knowledge and ability.

.....,
Appraiser.

Sworn to before me this }
day of, 192.. }
.....

(Follow with similar oath for second appraiser.)

INVENTORY.

A true and perfect inventory of all the goods, chattels and credits of
....., deceased, made after notice duly given, in the presence of such
of the parties interested as attended, by the of the estate of the
said decedent with the aid of and, both of Rensse-
laer County, duly appointed and sworn as appraisers of the personal property
of said decedent.

- I. (Articles of property set apart for the widow or widower or minor children.
Enumerate articles of property to be set apart not exceeding in value \$500.)
- II. (Bible, pictures and books, value not exceeding \$50.)
- III. (Domestic animals and food, value not exceeding \$150.)
- IV. (Money or other personal property, value not exceeding \$150.)

INVENTORY OF ASSETS.

.....
.....
We do hereby certify that in pursuance of our appointment and oath as
appraisers of the personal property of, deceased, we have made
the foregoing inventory and have signed duplicate copies thereof.

.....,
.....,
Appraiser.

STATE OF NEW YORK, }
Rensselaer County, } ss.:

I,, one of the appraisers appointed to make an appraisal of the
personal property of, deceased, do swear, that in making said
appraisal, I was actually employed days, and that my expenses
actually and necessarily incurred amounted to dollars.

Sworn to before me this }
day of, 192.. }
.....

(Follow with similar affidavit of second appraiser.)

Fees and expenses of appraiser taxed at \$. and of ap-
praiser taxed at \$.

.....,
Surrogate.

STATE OF NEW YORK, }
Rensselaer County, } ss.:

I,, of the estate of, late of the of
....., in said county, deceased, do swear that the foregoing inventory
is in all respects just and true; that it contains a true statement of all the
personal property of the said decedent, which has come to my knowledge and
particularly of all money belonging to the said decedent, and of all just claims
of the said decedent against me, according to the best of my knowledge, and
that at least five days prior to the making thereof, the notice of the said
appraisal, hereto annexed, was duly served on each of the legatees or next of
kin of the said decedent residing in said Rensselaer County, and was posted in
three of the public places, in the of therein.

Sworn to before me this }
day of, 192.. }
.....

FORM No. 177.

Petition for Order to File Inventory.

(Title.) [§ 199, ¶ 190]
To the Surrogate's Court of Rensselaer County:

The petition of, of the Village of Hoosick Falls, in the County
of Rensselaer and State of New York, respectfully shows, that your petitioner
is a legatee of, deceased, and that there is justly due to your
petitioner from said estate a specific legacy of \$300.

Your petitioner further shows, that letters of administration with the will
annexed of all and singular the goods, chattels and credits of the said
....., deceased, were, on the day of, 192.., granted by
the Surrogate of the County of Rensselaer to, a daughter of said
.....; that more than three months have elapsed since the granting
of said letters, and that the said has failed to return an inven-
tory of the personal property of the said estate, and that the said
has not obtained a further allowance of time to do so.

That there are no other persons, etc. (Subd. 4, § 51.)
Your petitioner, therefore, prays that an order may be made requiring
..... to make and file an inventory of the personal property of the said
..... on or before the day of, 192..; or in default
thereof to show cause before this court on the day of, 192..,
why she should not be removed or punished.
Dated,, 192..

(Add verification.)

NOTE.—This form may be used for the purpose of procuring the filing of an
amended or further inventory by making the proper changes

FORM No. 178.

Petition for Examination of Person as to Possession of Property.

[§ 205, ¶ 185]

SURROGATE'S COURT, County of Rensselaer.

In the matter of the estate of....., }
Deceased. }

The petition of, of Troy, N. Y., respectfully shows:

I. That she is the sole executrix of the last will and testament of, late of the City of Troy, N. Y., deceased, and that letters testamentary were issued to your petitioner by this court on the day of, 192..

II. Your petitioner further shows, on information and belief, that certain personal property consisting of two certain certificates of indebtedness issued by the Company to said in his lifetime, viz.:

Certificate No. 166, dated December 31, 1905, for the amount of \$1,891; and certificate No. 167, dated December 31, 1905, for \$6,544.71, and which should be delivered to your petitioner and included in her inventory, are in the possession of and under the control or within the knowledge or information of, of the City of Troy, N. Y., who withholds the same from your petitioner, so that the said property cannot be inventoried or appraised.

III. That your petitioner has made diligent search and inquiry in regard to said property and is informed and verily believes, that the same was in the possession of the decedent within two years prior to his death and came into the possession of the said at the time and under circumstances unknown to this petitioner.

IV. Your petitioner has demanded of the said the delivery of the said property, but that the said has wholly neglected and refused to deliver the same to your petitioner.

V. That there are no other persons, etc. (Subd. 4, § 51.)

Wherefore, your petitioner prays for an inquiry respecting said property so withheld, under section 205 of the Surrogate's Court Act, and further prays that the said may be ordered to attend such inquiry and be examined accordingly, and that your petitioner have such other and further relief in the premises as may be just.

.....,
Petitioner.

(Verification.)

FORM No. 179.**Order for Examination.**

[§ 205, ¶ 185]

(Title.)

(Caption.)

It having been made to appear to the satisfaction of the surrogate from the petition of, dated the day of, 192.., that there are reasonable grounds for an examination and inquiry under and pursuant to section 205 of the Surrogate's Court Act; it is

Ordered, that, residing at, appear before the Surrogate's Court, held at the on the day of, 192.., at 10 o'clock a. m., then and there to be examined in relation to the matters set forth in the petition.

FORM No. 180.**Petition to Compromise Cause of Action Prosecuted Under Limited Letters.**

[§ 122, ¶ 87]

SUPREME COURT, Rensselaer County.

In the matter of the application of
as administratrix of the goods, chattels and
credits of, deceased, for leave
to compromise a disputed claim.

To the Surrogate's Court of the County of Rensselaer:

The petition of, above-named, respectfully shows:

I. That, deceased, your petitioner's intestate, on or about, while in the employ of the New York Central and Hudson River Bridge Company, was killed in a collision of trains of the Boston and Albany Railroad Company at or near Rensselaer, in the County of Rensselaer, in this State.

II. Your petitioner thereafter made application to this court for limited letters of administration upon the goods, chattels and credits which were of said, deceased, who died intestate, for the purpose of bringing an action to recover damages for such death against said railroad company upon the ground that the same was caused by the negligence of said company, and on said application your petitioner filed a bond for \$400 on or about the day of, 192..

III. Thereafter such proceedings were had and taken that limited letters of

administration of the goods, chattels and credits of said deceased were issued to your petitioner on or about the ... day of, 192.., authorizing and empowering her to enforce the collection of and to bring an action against said railroad company upon said claim under the statute. That said action was duly commenced by your petitioner through, her attorneys, against said company, by the service of a summons and complaint. That the said company duly appeared in said action and served an answer through, its attorneys, and has since up until this time, vigorously contested said claim and suit upon the ground that the said death was not caused by the negligence of the said company defendant, and upon the further ground that the death of said intestate was caused or contributed to by his own negligence and carelessness.

Negotiations have been entered into with a view of settling said claim and action with said railroad company, and as your petitioner is informed by her said attorneys, said company has offered the sum of \$4,500 in full settlement and discharge of said claim and suit.

IV. That as your petitioner is advised by her said attorneys there is some uncertainty as to whether she would be finally successful in said action, and uncertainty as to the amount of damages which might be awarded to her as such administratrix in the event of her success upon a trial of this action. That she is informed and believes that the said sum of \$4,500 is the highest amount that the said company will offer or give under any circumstances to settle and compromise said claim and action before trial. That petitioner is advised by her counsel that said compromise and settlement would be advantageous to her interest individually and as such administratrix, and is desirous of accepting the same. That said deceased left him surviving besides his widow, three children, all of whom are minors. That said widow and children are in need of the proceeds of said compromise; that said widow and children have no other moneys or means of support except what they earn themselves.

V. That there are no other persons interested, etc. (§ 51, subd. 4.)

Wherefore, your petitioner prays for an order of the surrogate authorizing her as such administratrix to compromise, settle and compound said claim against the Boston and Albany Railroad Company and to discharge and release said company from the said suit and claim for the sum of four thousand five hundred dollars (\$4,500), and to discontinue said action, and that the restriction contained in her letters of administration be removed.

Dated, Albany, N. Y.,, 192..

.....,

Petitioner.

(Add verification.)

FORM No. 181.

Affidavit.

SURROGATE'S COURT, Rensselaer County.
(Title.)

STATE OF NEW YORK, }
City and County of Albany, } ss.:

..... being duly sworn says that he is one of the attorneys for the above-named petitioner in her action against the Boston and Albany Railroad Company to recover damages for the death of said deceased intestate and has had personal charge of said litigation since the commencement thereof. That in negotiations for a settlement of said suit and claims the defendant has offered the sum of \$4,500 in full settlement, discharge and release of said claim. That deponent is informed and verily believes from his knowledge of the case and from his experience in conducting negotiations for settling cases with the same defendant that said sum is the highest that said company would offer to settle and compromise said claim and suit. That owing to the uncertainty of plaintiff's success and of the amount she would recover as such administratrix as damages in the event of success, and because of deponent's knowledge of the facts and acquaintance with the law applicable to this case, with which he is familiar, he verily believes that to accept said offer by way of compromise would be beneficial and advantageous to the plaintiff as such administratrix and for the benefit of said estate. Deponent's said firm have conducted negotiations for a settlement and have secured said offer to be made by said defendant company. Deponent's firm, as plaintiff's attorneys and as counsel for said administratrix, have advised said administratrix to accept said offer in compromise and settlement and to compound said suit and claim for the said sum.

Subscribed and sworn to before me }
this day of, 192.. }

.....,
Notary Public, Albany Co., N. Y.

FORM No. 182.

Order to Compromise and Receive Payment.

[§ 122, ¶¶ 87, 417]

At a Surrogate's Court held in and for the County of
Rensselaer, on the day of, 192...,
at the Court House in the City of Troy, N. Y.

Present: Hon., Surrogate.

<p>In the matter of the application of as administratrix of the goods, chattels and credits of, deceased, for leave to compromise a disputed claim.</p>

On reading and filing the petition of, as administratrix, etc., of, duly verified by her, and the affidavit of, one of the firm of, attorneys for said petitioner, in the action hereinafter referred to, verified, and it satisfactorily appearing to me therefrom that there is good and sufficient cause for allowing the said administratrix to compound and compromise a disputed claim made by her against the Boston and Albany Railroad Company, for four thousand five hundred dollars (\$4,500), the said terms of compromise therein named, and it appearing that said compromise would be advantageous to said estate, and the said terms being approved of, it is

Ordered, that the said administratrix be, and she is hereby, authorized to accept four thousand five hundred dollars (\$4,500) as a full settlement, release and discharge of the claim made and the suit brought by her as such administratrix, to recover damages for the death of the said, deceased, against the Boston and Albany Railroad Company, and to release and discharge said claim.

And the said administratrix having filed security to the satisfaction of the surrogate, it is

Further Ordered, that the restriction contained in her letters of administration be and the same hereby is removed and vacated.

.....,
Surrogate.

NOTE.—See § 252 Sur. Ct. A., where instead of obtaining an order of compromise, a judicial settlement may be had, and the necessary authority given in that proceeding.

FORM No. 183.

Petition for Authority to Transfer Securities to Representative Individually.

SURROGATE'S COURT, County of Rensselaer.

In the matter of the estate of
Deceased.

To the Surrogate's Court of Rensselaer County:

The petition of residing in the said City of Troy, County of Rensselaer, respectfully shows that, late of the City of Troy, died at Saranac Lake, N. Y., on or about the day of, 192..

That subsequently, on the day of December, 192.., letters of administration were issued by the Surrogate's Court of Rensselaer County on the estate of said deceased to your petitioner the mother of deceased. That said left her surviving, your petitioner, her mother, and a sister,, and a brother,, all residing in Troy, N. Y.

That the entire estate of the said consisted of six shares of stock in the Pennsylvania Railroad Company of the value of about \$900.

That said and have sold, assigned and transferred to your petitioner all their right, title and interest in and to the estate of said deceased and that your petitioner is now the only party who has any interest in the estate of said deceased and is the sole owner thereof.

That your petitioner further says that she is desirous of having said six shares of stock standing on the books of the Pennsylvania Railroad Company in the name of assigned and transferred to herself individually. That it is contrary to the custom of said Pennsylvania Railroad Company to transfer stock from the name of the decedent to the individual name of an administratrix without an order of the court having jurisdiction of the estate of deceased.

That there are no other persons interested, etc. (§ 51, subd. 4.)

Wherefore your petitioner prays for an order allowing her to transfer as administratrix said six shares of stock from the name of the decedent to the individual name of your petitioner.

Dated, Troy, N. Y., this day of, 192..

.....,
Petitioner.

(Add verification.)

Order Thereon.

(Caption.)

SURROGATE'S COURT, County of Rensselaer.

In the matter of the estate of	}
Deceased.	

On reading and filing the petition of, administratrix of, deceased, verified on the day of, 192., praying for an order authorizing her as administratrix to transfer six shares of stock of the Pennsylvania Railroad Company standing in the name of to herself individually.

Ordered, that the said, as administratrix of the estate of, is hereby authorized to transfer said six shares of stock in the Pennsylvania Railroad Company standing in the name of to herself individually.

.....,
Surrogate.

FORM No. 184.**Certificates to Accompany Transfer of Mortgage on Western Land.**

STATE OF NEW YORK, }
County of } ss.:

In Surrogate's Court:

I,, Clerk of the Surrogate's Court of said County of, which court is a court in which, according to the laws of the State of New York, wills are proven and admitted to probate and letters testamentary thereon issued, do hereby certify, that I have compared the foregoing and annexed copy of letters testamentary upon and under the will of, late of the City of, N. Y., deceased, and the appointment of as executor of said will with the original record thereof remaining in this court and recorded in this court on the day of, 19., in book of surrogate's records, No., at page, and that said copy is a correct transcript of said original record and of the whole thereof. Said court is a court of record, and I am the custodian of the records of said court.

I further certify that I have compared the foregoing and annexed copy of qualification of said, as said executor of said will of, deceased, with the original record thereof now on file in said surrogate's court and office and that the same is a correct transcript thereof and of the whole of said original record.

And I further certify that the letters testamentary issued on the estate of were in full force and effect on the day of, 192., and are still in full force and effect and unrevoked.

In Testimony Whereof, I have hereunto subscribed my name and affixed the
[L. S.] seal of said court this day of, 192..

.....,

Clerk of the Surrogate's Court.

STATE OF NEW YORK, }
County of Rensselaer, } ss.:

In the Surrogate's Court of Rensselaer County:

I,, Judge of the Surrogate's Court of the County of Rensselaer, in the State aforesaid, and presiding magistrate thereof, do hereby certify that, who signed the foregoing certificate dated, 19.., was on said date and now is the Clerk of said Surrogate's Court of the County of and the custodian of the records of said court, and that the foregoing certificate, by him subscribed, is in due form.

I do hereby certify that the signature of the said, attached to the foregoing certificate is in the genuine handwriting of the said, and that he is authorized by the law to certify to copies of records of said surrogate's court.

In Testimony Whereof, I have hereunto set my hand and seal of the
[L. S.] said Surrogate's Court in the County and State aforesaid this day of, 192..

.....,

Surrogate.

STATE OF NEW YORK, }
County of Rensselaer, } ss.:

In the Surrogate's Court of said County:

I,, Clerk of the Surrogate's Court, in and for the County of, in said State, do hereby certify that is the judge of the surrogate's court of said county and is the presiding magistrate thereof; that said court is a court of record; that the signature of to the foregoing certificate is his genuine signature and is in the genuine handwriting of the said; that the seal affixed to the foregoing certificate is the genuine seal of the said surrogate's court of the county aforesaid, and that I have the care and custody of the said seal as clerk of the said court.

In Testimony Whereof, I have hereunto set my hand and the seal of
[L. S.] the Court at the City of Troy, in the County and State aforesaid, this day of, 192..

.....,

Clerk of the Surrogate's Court of Rensselaer County.

FORM No. 185.

Petition for Payment of Funeral Expenses.

[§ 216, ¶ 231]

SURROGATE'S COURT, Rensselaer County.

In the matter of the estate of
Deceased.

To the Surrogate's Court of Rensselaer County:

Your petitioner respectfully shows to the court and alleges:

That died in the City of Troy, Rensselaer County, New York, on, 192., leaving a last will and testament which was duly admitted to probate in the Surrogate's Court of Rensselaer County on September, 192., and letters testamentary were issued thereon to who resides at 514 Main street, Worcester, Massachusetts, and who thereupon duly qualified and is now acting as the executor of the estate of deceased,

That the petition for the probate of the will recited that the property of the deceased consisted of five hundred dollars (\$500) real estate, and three thousand dollars (\$3,000) personal estate.

That the estate of is indebted to your petitioner, for funeral expenses, for the burial of the said, on, 192., and that thereafter the claim against said estate for said funeral expenses was duly presented to the executor.

That more than sixty days have elapsed since the granting of the said letters testamentary, and the said claim so presented, amounting to two hundred nineteen dollars (\$219), has not been paid and no part thereof has been paid. That the reasonable charges for funeral expenses for said deceased were two hundred nineteen dollars (\$219), and that said account has been presented to the executor, and no objection made thereto.

Deponent further says that are the attorneys for the said executor, and have promised from time to time to have the said account paid by their client, said, and have admitted that the said has more than sufficient funds in his hands as said executor to pay the said account in full.

That there are no other persons, etc. (§ 51, subd. 4).

Wherefore your petitioner prays that said may be cited to show cause why he should not be required to pay the same.

Dated,, 192..

(Add verification.)

Petitioner

FORM No. 186.**Notice of Rejection of Claim.**

[§ 211, ¶ 223]

NOTICE OF REJECTION OF CLAIM.

To, Claimant,

Take notice that the undersigned of hereby rejects the whole of the claim against said deceased presented by you to him on the..... day of, 192.., for the amount of \$....., (or rejects that part of the claim, etc., specified as follows:) and that said claim (or that the part of said claim rejected) will be submitted for trial and determination on the judicial of his accounts.

Dated,, 192..

.....

NOTE.—If the claimant does not sue on such claim within three months, no other proceedings are necessary to have a trial on judicial settlement.

FORM No. 187.**Decree Disallowing Claim After Trial Before Surrogate.**

[§ 211, ¶ 223]

At a Surrogate's Court, held in and for the County of Rensselaer,
at the Surrogate's Office in the City of Troy, N. Y., on the
..... day of, 192..

Present: Hon., Surrogate.

SURROGATE'S COURT.

In the matter of the claim of the city of Troy	}
against the estate of,	
Deceased.	

The above-named claimant, the City of Troy, having on the day of, 192.., presented a claim for \$997.76 to, as administrator, and, as administratrix, with the will annexed, of the said deceased,, and the said claim having been disputed and duly rejected by the said administrators accompanied with a statement that said claim would be submitted for trial, upon the judicial settlement of the accounts of the said administrators, and the said administrators having on the day of,

192.., duly filed in the Surrogate's Court of the County of Rensselaer a petition praying that their accounts as such administrators with the will annexed of said deceased be judicially settled, and having also filed the account of their said proceedings as such administrators, and a citation having been thereupon duly issued to all persons interested in the estate of said deceased requiring them to show cause in said Surrogate's Court on the day of, 192.., why said account should not be judicially settled, and said citation having been returned with proof of the due service thereof according to law, and said administrators having appeared in person and by, Esq., as their attorney, and said claimant having appeared by, Esq., Corporation Counsel, and the said Surrogate having then and there upon said judicial settlement proceeded to hear and determine said claim; and the said Surrogate after having heard the proofs and allegations of the parties and the arguments of counsel thereon, and after due deliberation had, having duly made and filed his decision whereby he finds that the said claim of the said City of Troy is not a valid claim against the estate of said deceased, and that the same should be disallowed.

Now, upon motion of, attorney for said administrators,

It is Ordered, Adjudged and Decreed, that the said claim of the said City of Troy is not a valid claim against the estate of said deceased, and the same is hereby disallowed.

Witness, Hon., Surrogate, and the seal of the court, the
[L. S.] day and year first above written.

.....,
Surrogate.

NOTE.—This determination may be embodied in the decree; or if an appeal is anticipated, an intermediate decree similar to the above may be entered, and the final decree not entered until the decision on the appeal.

FORM No. 188.

General Petition for Citation to Show Cause on Account of any Delinquency.

SURROGATE'S COURT, County of New York.

In the matter of the estate of
Deceased.

To the Surrogates' Court of the County of New York:

The petition of who resides at No. street, respectfully sheweth: That your petitioner of deceased.

That letters on the estate of said deceased were granted by the Surrogate of the County of New York to on the day of

That more than has elapsed since ..h.. appointment, and the said ha.. not

That no other persons are interested, etc. (§ 51, subd. 4.)

Your petitioner therefore prays that a citation may be issued requiring the said to show cause why

.....,
Petitioner.

(Add verification.)

FORM No. 189.

Petition to Compel Payment of Debt or Legacy.

[§ 217, ¶¶ 239, 302]

SURROGATE'S COURT, County of Rensselaer.

In the matter of the estate of
Deceased.

To the Surrogate's Court of the County of Rensselaer:

The petition of of the of in the County of respectfully sheweth:

That your petitioner is a of late of the of in the County of Rensselaer aforesaid, deceased, and that letters were on the day of, 192.., granted and issued by said Surrogate to of the of and that more than months and days have expired since the time of such appointment as such and no notice to creditors has been published as required by law.

Your petitioner further shows that the said, deceased, left personal estate to the amount of \$....., or thereabouts, as by the inventory thereof, filed in the office of said Surrogate, will more fully appear, and that there is money or other personal property of the estate, applicable to the payment or satisfaction of petitioners, which may be applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction.

That your petitioner is entitled to make this application by reason of the following facts:

That no other persons than those mentioned are interested in this application.

Wherefore your petitioner prays for a decree directing the said to pay the petitioners \$....., and that said, be cited to show

cause why such a decree should not be made; and that such further or other proceedings, according to law and pursuant to the practice of this court, may be thereon had as may be requisite to enforce the payment of your petitioner's claim aforesaid, and as to the Surrogate shall seem just and equitable.

Dated Troy, N. Y.,, 192..

.....,
Petitioner.

(Add verification.)

FORM No. 190.

Bond on Payment of Legacy.

[§ 218, ¶ 290]

Know All Men by These Presents, That we as principal and and as sureties are held and firmly bound unto, in the sum of dollars, lawful money of the United States of America, to be paid to the said, or his successor in office; to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the day of, in the year of our Lord one thousand nine hundred and twenty

The condition of this obligation is such, that if debts against deceased duly appear, and there are not other assets to pay the same, and no other assets sufficient to pay other legacies, than the above bounden will refund the legacy so paid, or the value of the article so delivered, with interest thereon except where a specific article has been delivered, or such ratable proportion thereof with other legatees; as may be necessary for the payment of such debts, and the proportional parts of such other legacies if there be any, etc. (as in section 218), then this obligation to be void, otherwise to remain in full force and virtue.

.....
.....

(Add acknowledgments and justifications.)

FORM No. 191.

Petition Against Testamentary Trustee for Payment of Legacy.

[§ 219, ¶ 345]

(Title.)

To the Surrogate's Court of County:

The petition of, residing at, respectfully shows:

That is the duly appointed and acting testamentary trustee under the will of, deceased.

That your petitioner is entitled under the terms of the will of said deceased to receive from such trustee the sum of \$....., pursuant to the following bequest or directions contained in said will, namely: (or to the delivery of certain personal property, described as follows, pursuant to, etc.)

That the only persons whose rights or interest would be affected by the decree herein asked for are, and that no other persons are interested in this application.

Wherefore your petitioner prays that said testamentary trustee and, who would be affected by the decree herein may be cited to show cause why such payment (or delivery) to your petitioner should not be made forthwith, and for such other relief as may be just.

Dated,, 192..

(Verification.)

.....

FORM No. 192.

Petition for Leave to Issue Execution on Decree.

[§ 151 Dec. Est. L., ¶ 35]

SURROGATE'S COURT, Rensselaer County.

In the matter of the estate of,
Deceased.

To the Surrogate's Court of Rensselaer County:

The petition of, the undersigned, respectfully shows to this court:

I. That she is a creditor of and a person interested in the estate of, and that the validity of her claim has been duly established by a decree of this court.

II. That such order and decree was duly made and entered in this court by the terms of which it was ordered, adjudged and decreed that pay to, your petitioner, the amount of her claim against the estate of, amounting to four hundred and seventy-two dollars with interest thereon, within twenty days from the date of service of said order, and in default thereof that she show cause before this court on the day of, 192.., at ten o'clock in the forenoon of that day, before the Surrogate of the County of Rensselaer, why she should not be attached and why she should not be punished for contempt; that said order was duly filed in this court on the day of, 192.., and recorded in book of Surrogate's Records No. 180 at page 204.

On information and belief petitioner further alleges that due and timely service of said order and decree was made on said; that she failed to pay to your petitioner the said amount so ordered to be paid or any

part thereof, and that she appeared before this court at the time and place specified in said order, but that no further order or decree of this court was ever made or entered in the premises.

III. Your petitioner further alleges, on information and belief, that transcripts of said decree have been duly issued by the clerk of this court, one of which has been duly filed in the office of the clerk of the County of Rensselaer, New York, and one in the office of the County Clerk of the County of Albany, New York, and certified copy of said decree made and entered on the day of, 192.., has been duly recorded in the office of the clerk of the County of Rensselaer, N. Y.

IV. Your petitioner further alleges, on information and belief, that no execution against the property of the person so ordered to pay money to this petitioner has ever been issued out of this court on said decree, and that more than five years have passed since the same was entered in this court; that the said executrix has not during all this time had any judicial settlement of her accounts as executrix nor taken any steps toward a settlement of her accounts or the payment of this claim of your petitioner; and your petitioner further alleges that no part of her said claim has ever been paid, and said decree remains wholly unsatisfied.

V. That there are no other persons than those mentioned interested in this application.

Wherefore, your petitioner prays that a citation issue out of this court citing said to show cause why an execution should not be issued on said decree, and that an order of this court be made granting leave to issue an execution on said decree, and that your petitioner may have such other or further relief, or both, as may be just.

Dated,, 192..

.....,

Petitioner.

(Add verification.)

Citation to Show Cause.

(Usual citation to show cause, inserting:)

"show cause why an execution should not be issued on a decree of this court, made on the day of, 192.., in which it was ordered, adjudged and decreed that, executrix of the last will and testament of, pay to the sum of four hundred and seventy-two dollars with interest."

FORM No. 193.

Order Granting Leave to Issue Execution.

[§ 152 Dec. Est. L., ¶ 35]

(Title.)

(Caption.)

A decree having been heretofore and on or about the day of, 192.., duly made and entered decreeing that, executrix of the

last will and testament of, pay to the amount of her claim against the estate of, deceased, amounting to four hundred and seventy-two dollars with interest thereon, and no execution having been issued on said decree within five years after the entry of said decree, and, the said creditor, having duly made application by petition to this court praying that an order might be made granting leave to issue an execution on said decree, and a citation having thereupon duly issued out of this court directing the said, who is now, to show cause before this court on the day of, 192., why an order should not be made granting leave to issue an execution on said decree, and said citation having been duly returned with proof of due and personal service thereof on said, and the said petitioner,, having appeared by, her attorney, and the said having appeared in person.

Now after hearing, attorney for petitioner,

Ordered, that leave be and it hereby is granted to said petitioner to have an execution issue on said decree; and it is further ordered, that an execution on said decree issue out of this court.

.....,
Surrogate.

FORM No. 194.

Execution Against Property.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK.

To the Sheriff of the County of

Whereas, on the day of, 19.., the Surrogate's Court of the County of Rensselaer duly made a decree directing the payment by of the of, late of the of, in said County of Rensselaer, deceased, to of the sum of dollars

.....
A transcript whereof was duly filed and said decree duly docketed in the clerk's office of the County of, on the day of, 192..

But whereas, there is now actually due on said decree the sum of dollars, and interest thereon from the day of, 19..

You are therefore commanded and required to make such sum of dollars, out of any of the goods, chattels and personal property of the said in your county, and if sufficient thereof cannot be found in your county, then out of the real property in your county, of which the said was seized, and belonging to him on the said day of, 19.., or at any time thereafter, in whose hands soever the same may be, and that you return this execution with your proceedings thereon, to

the Surrogate's Court of said County of Rensselaer, in sixty days after the receipt by you of the same.

In Testimony Whereof, we have caused the seal of our said Surrogate's Court to be hereunto affixed.

Witness, Hon., Surrogate of our said County of Rens-
[L. S.] selaer, at Troy, N. Y., this day of, 192..
.....
Clerk of the Surrogate's Court.

FORM No. 195.

Petition by Surety to be Released from Bond.

[§ 109, ¶ 121]

(Title.)

To the Surrogate's Court of said County of Rensselaer:

The petition of of the of, in the County of Rensselaer, State of New York, respectfully shows:

That your petitioner the sureties in the bond given by duly appointed by this court as of and desire.. to be released from responsibility on account of any future breach of the condition of said bond.

That there is no other person than such interested in this application.

Wherefore, your petition.. pray.. that may be released accordingly, and that the said be cited to show cause why should not give new sureties, and that such proceedings may be had herein as shall be proper and as the law requires.

Dated, this day of, 192..
.....

(Add verification.)

(For order requiring filing of new bond and revoking letters for failure to comply, see those forms.)

FORM No. 196.

Petition to be Released from Surety Bond.

[§ 109, ¶ 121]

SURROGATE'S COURT, Rensselaer County.

In the matter of the application of the
 Surety Company of
, to be released as surety
 on the official bond of
 trustee under the will of
 Deceased.

To the Surrogate's Court of the County of Rensselaer:

The petition of the Surety Company of, a domestic corporation, having an office and principal place of business at No. in the of, State of, and County of, respectfully shows:

I. That it became, and is, surety upon the bond of, as trustee under the will of, deceased, which said bond bears date of the day of, 192., and which was filed in the office of the Surrogate of Rensselaer County, on or about the same day.

II. That your petitioner desires to be released as such surety for the said, as trustee under the will of, deceased, and from any further responsibility and liability on account of any future breach of the condition of the aforesaid-mentioned bond.

III. That there are no other persons than those mentioned interested in the application.

Wherefore, your petitioner prays that the principal mentioned in said bond, to-wit: be cited to show cause why he should not be required to give new surety on his bond as trustee under the will of, deceased, as provided for by section 109 of the Surrogate's Court Act, and further, why he should not render and cause to be judicially settled, his account as such trustee.

That no previous application for the relief asked herein has been made.

Dated,, N. Y.

[L.S.]

..... SURETY COMPANY,

By,

President, Petitioner.

.....
 Attorney for Petitioner,

No.

..... of
 County of } ss.:

....., being duly sworn, says that he is the president of the
 Surety Company of, the petitioner in the above-entitled proceed-

ing; that he has read the said petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Sworn to before me this }
day of, 192.. }

.....,

Notary Public.

[L. S.]

FORM No. 197.

Order to File New Surety.

[§ 109, ¶ 121]

(Title.)

(Caption.)

..... Surety Company of, surety upon the official bond of, as trustee under the will of, deceased, in the sum of (\$.....) dollars, having made application by petition to be relieved from liability as surety upon such bond for the act or omission of said trustee, as by its petition more fully appears, and said application having come on to be heard,

Now, after reading and filing the verified petition of the Surety Company of, and proof of due service of the citation to show cause,

Now, on motion of, attorney for the Surety Company of, petitioner, no one opposing said application, it is

Ordered, that the said file with the clerk of this court a bond with new surety, or sureties, to the satisfaction of this court, within five days from the date of the entry of this order.

.....,

Surrogate.

FORM No. 198.

Order Releasing Surety.

[§ 109, ¶ 121]

(Title.)

(Caption.)

..... Surety Company of, surety on the official bond of, as trustee under the will of, deceased, having made

application by petition to be released as surety upon such bond for the act or omission of said trustee, and thereafter and on or about the day of, 192.., said application having come on to be heard, and an order having been duly made and entered herein, in the office of the Clerk of the Surrogate's Court of Rensselaer County, on or about the day of, 192.., and which said order directed the said, as trustee under the will of, deceased, to file with the Clerk of this Court a bond with new surety (or sureties) to the satisfaction of the Court, within days from the date of the entry of said order and it appearing that the said has fully complied with the terms of said order by having filed or caused to be filed, on or about, 192.., a new bond, in the usual form, which said bond was duly approved.

Now, on motion of, attorney for the Surety Company of, petitioner in the afore-mentioned proceeding, it is

Ordered, that the said Surety Company of, surety on the bond of, as trustee under the will of, deceased, be released from any future liability upon its bond for any act or default of the said, as such trustee, subsequent to the date of this order; and it is further

Ordered, that the said, as trustee under the will of, deceased, render and cause to be settled his account as such trustee to and including the date of this order, and that he file such account within twenty (20) days from the entry of this order.

.....,
Surrogate.

FORM No. 199.

Petition of Interested Person for New Bond or New Surety

[§ 107, ¶ 120]

(Title.)

To the Surrogate's Court of County:

The petition of, residing in, respectfully shows:

That he is interested in the above-entitled estate (or fund) as a

That is the duly appointed and acting of and has by law (or by an order of this court) been required to give and file a bond in the penal sum of \$..... for the faithful performance of his obligations therein.

That such bond so given is insufficient in amount by reason of the following facts:

That, a surety on such bond is dead (has removed or is about to remove from the State of New York, has become, through loss of property, insufficient as a surety on such bond).

That there are no other persons than those mentioned interested in this application.

Wherefore your petitioner prays (state relief asked for); and that said be cited to show cause why the relief asked for should not be granted, or in default thereof that he be removed from his office (or that his letters be revoked) and for such other relief as may be just.

Dated

.....,

Petitioner.

(Add verification.)

FORM No. 200.

Application for Discharge of Bond Given on Appeal or for the Performance of an Act.

[§ 116, ¶ 127]

NOTICE OF MOTION.

SURROGATE'S COURT, County of

In the matter of the application of
for the discharge of a certain bond or under-
taking given in the matter of }

Sir:

Please take notice, that upon the affidavit served herewith, and upon all the papers and proceedings in the matter of, filed in this court, a motion will be made before the Surrogate's Court at the of, N. Y., on the day of, 192.., at 10 o'clock a. m., or as soon thereafter as counsel can be heard for an order discharging a certain bond or undertaking given in the matter and filed in this court on the day of, 192.., and for such other and further relief as shall be just.

Dated, 192..

.....,

Attorney for

To the Surrogate's Court,
and

Office and Post Office Address,

.....

FORM No. 201.**Application for Order that Temporary Administrator Provide for Family.**

[§ 131, ¶ 243]

NOTICE OF MOTION.

SURROGATE'S COURT, County of

In the matter of the application of
for an order that, the temporary
administrator of the estate of,
provide for the family of the absentee.

Usual notice of motion stating object as follows:

For an order of this court directing, as temporary administrator of the estate of, an absentee to make suitable and proper provision for the support of the family of said absentee out of any personal property in his hands.

FORM No. 202.**Petition for Resignation and Revocation of Letters.**

[§ 102, ¶ 109]

Petition must be in form of a petition for judicial settlement, but must ask in addition that the representative may be allowed to resign and that his letters may be revoked. It must also set forth the facts upon which the application for leave to resign is based, showing good and sufficient reasons for the application.

Citation:

The citation must be issued to show cause why the resignation and revocation of letters should not be granted and the accounts of the representative judicially settled.

FORM No. 203.**Forms for Assessing Transfer Tax Under Tax Law.**

[Section 220 et seq.]

No forms are inserted for the affidavits and orders, since the Tax Department prepares and furnishes those forms specially prepared in accordance with their special requirements. Such forms can be obtained from the Transfer Tax appraiser or the County Treasurer in each county. The subject is full treated in Otis & Gleasons work on that subject.

For affidavit as to value of property to be filed with petition for probate or for administration see Form No. 64.

FORM No. 204.

Affidavit Showing Exemption of Corporation from Transfer Tax.

[§ 93, 163]

In re the transfer tax upon the estate of

 Deceased.

STATE OF NEW YORK, }
 County of Rensselaer, } ss.:

....., being duly sworn, says that he is one of the governors of the Marshall Infirmary, a public hospital in the City of Troy, the institution referred to in the will of the aforesaid, deceased.

That the said Marshall Infirmary was organized under and by virtue of an act of the Legislature, passed June 20, 1851, entitled "An Act to incorporate the Marshall Infirmary in the City of Troy." That this association is a "hospital or infirmary corporation" and as such is entitled to the exemptions allowed by section 221 of the Tax Law of the State of New York, which reads in part as follows:

"Exceptions and limitations.—Any property devised or bequeathed for religious ceremonies, observances or commemorative services of or for the deceased donor, or to any person who is a bishop or to any religious, educational, charitable, missionary, benevolent hospital or infirmary corporation."

That no officer, member or employee of the association receives or is entitled to receive any pecuniary profit from the operation thereof except reasonable compensation for his or her services. That this corporation is not a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association, or for any of its members or employees, and that it is in good faith organized and conducted exclusively for the purposes of a hospital or infirmary. Said association claims exemption of the tax in this proceeding.

Sworn to before me this }
 day of, 192.. }

.....,
 Notary Public, Albany County, N. Y.

Certificate filed in Rensselaer County, N. Y.

FORM No. 205.

Petition for Appointment of General Guardian for Infant Under Fourteen.

[§§ 175, 176, ¶ 96]

SURROGATE'S COURT, County of New York.

In the matter of the petition of
for the appointment of a general guardian of
the person.. and property of,
infant.

To the Surrogate's Court of the County of New York:

The petition of alleges:

That your petitioner.. reside.. at in the County of New York,
and is the of infant.. under the age of fourteen
years, who reside.. at in the County of New York, with
and that was born on the day of, 192..

That the father of said infant resides at

That the mother of said infant resides at

That the names and post-office addresses of the nearest next of kin of full
age residing in the County of New York, so far as they can be ascertained with
due diligence, are as follows:

Name.	Relationship.	Post-Office Address.
.....
.....

That there are no other persons than those above-mentioned interested in this
proceeding.

That said infant.. entitled to certain property, and that to protect
and preserve the legal rights of said infant.., it is necessary that some proper
person should be duly appointed the guardian of person.. and property.

That said infant.. ha.... not had, at any time, a guardian appointed by will
or deed, or an acting guardian in socage, or a guardian of the person appointed
pursuant to section 86 of the Domestic Relations Law.

That said infant.. entitled to certain personal property, which does
not exceed the sum of dollars, and is not seized of any interest
in real property, as your petitioner is informed and verily believes.

Your petitioner.. therefore pray.. for a decree appointing who
resides at the general guardian of the person.. and property of
said infant.. during minority.,

Dated the day of, 192..

Petitioner.

(Add verification.)

County of New York, ss.:

I,, do hereby consent to be appointed general guardian of the
person.. and property of the above-named infant.., during minority, and-I do

solemnly swear and declare that I will, faithfully and honestly discharge the duties of such general guardian of the person.. and property of said infant.., according to law.

Sworn to before me this }
day of, 192.. }
.....,

Notary Public.

The undersigned the nearest next of kin of full age:

Name.	Relationship.
.....
.....
.....
.....

of the above-named infant.. do hereby waive the issue and service of a citation herein and do hereby consent and pray that be appointed the general guardian of the person.. and property of said infant.., and

(Add acknowledgment.)

I,, the proposed guardian named herein of the person.. and property of said, infant.., do hereby designate the Clerk of the Surrogate's Court of the County of New York, and his successor in office, as a person on whom service of any process issuing from the Surrogate's Court of the County of New York may be made, in like manner and with like effect as if it were served personally upon me, whenever I cannot be found and served within the State of New York after due diligence used. I am a resident of No.

(Add acknowledgment.)

FORM No. 206.

Petition for Appointment of General Guardian for Infant Under Fourteen.

[§§ 175, 176, ¶ 96]

SURROGATE'S COURT, Rensselaer County.

In the matter of the petition of }
for the appointment of a general guardian of }
the person and estate of, }
an infant under fourteen years of age. }

To the Surrogate's Court of the County of Rensselaer:

The petition of of the of, in the County of Rensselaer and State of New York, respectfully sheweth, that your petitioner is the of, who is a resident of the of in the County of Rensselaer, and under fourteen

years of age, and was years of age on the day of, 192..

That, the father of said infant, is now and resides at

That, the mother of said infant, is now and resides at

That the only other relatives of said minor residing in the County of Rensselaer, are

That said minor is entitled to certain property and estate, to-wit:

Personal property of the estimated value of \$.....

Annual income from other personal property under a trust or life

estate the principal of which will not come to the hands of the

guardian. \$.....

Income from real property each year..... \$.....

That a guardian has not been appointed, either by a court of competent jurisdiction or by the will or deed of the father or mother of said minor; nor has such minor a guardian in socage, or of h.. person only.

That would be a suitable person to be appointed such guardian by reason of the following facts:

That to preserve and protect the legal rights of said minor, it is necessary that some proper person should be duly appointed the general guardian of person and property.

That there are no other persons than those mentioned interested in this application.

Your petitioner, therefore, prays for a decree appointing some suitable person general guardian of the person and property of said minor.

Your petitioner further prays that said may be cited to show cause why such decree, as hereinbefore prayed for, should not be made.

And your petitioner will ever pray.

Dated the day of, 192..

(Add verification and consent and oath.)

FORM No. 207.

Petition of Infant Over Fourteen for Appointment of General Guardian.

[§§ 175, 176, ¶ 96]

SURROGATE'S COURT, County of New York.

In the matter of the application for the
appointment of a general guardian of the
person and estate of,
an infant over fourteen years of age.

To the Surrogate's Court of the County of New York:

The petition of residing at No. in the Borough
of, City and State of New York, respectfully

showeth that your petitioner is a resident of the County of New York, an infant over fourteen years of age and was born on the day of, 19.., and resides with at

That, your petitioner's father is living, and resides at

That, your petitioner's mother is living, and resides at

That the names and post-office addresses of the nearest next of kin of full age residing in the County of New York, so far as they can be ascertained with due diligence, are as follows:

Name.	Relationship.	Post-Office Address.
.....
.....
.....
.....

That there are no other persons than those above-mentioned interested in this proceeding.

That your petitioner is entitled to certain property and estate, and that to protect and preserve the legal rights of your petitioner it is necessary that some proper person should be duly appointed the guardian of h.... person and estate. Your petitioner has now no general or testamentary guardian appointed by will or deed, or an acting guardian in socage or a guardian of the person appointed pursuant to section 86 of the Domestic Relations Law, to the knowledge or belief of your petitioner.

That the estimated value of the personal property to which the infant is or will be entitled is dollars; that the annual income from all other personal property, the principal of which will not come to the hands of the guardian to which the infant is or will be entitled is dollars; and that the annual rents of the real estate to which the infant is or will be entitled to, do not exceed the sum of dollars, or thereabouts.

Wherefore your petitioner prays:

That a citation issue

That a decree issue appointing residing at, general guardian of h.... person and estate.

And your petitioner will ever pray.

Dated, New York, day of, 192..

.....,
Petitioner.

(Add verification.)
County of New York, ss.:
....., being duly sworn, doth depose and say that he has read the

statements contained in the foregoing petition as to the estimated value of the estate of said infant, and verily believes the same to be true.

Sworn to before me this }
 day of, 192.. }
 County and State of New York, ss.:

I,, do depose and say that I am a resident of No.
 in the Borough of, in the City and State of New York; that I
 am over twenty-one years of age, and that I will well, faithfully and honestly
 discharge the duties of guardian of the person and estate of,
 infant, according to law.

Sworn to before me this }
 day of, 192.. }

The undersigned the nearest next of kin of full age:

Name.

Relationship.

.....

 of the above-named infant do hereby waive the issue and service of a citation
 herein and do hereby consent and pray that be appointed the
 general guardian of the person and estate of said infant.

(Add acknowledgment.)

FORM No. 208.

Petition for Appointment of General Guardian for Infant Over Fourteen.

[§§ 175, 176, ¶ 96]

SURROGATE'S COURT, Rensselaer County.

In the matter of the petition of
 for the appointment of a general guardian
 of the person and estate of,
 an infant over fourteen years of age.

To the Surrogate's Court of the County of Rensselaer:

The petition of of in the
 County of Rensselaer and State of New York, respectfully sheweth, that your
 petitioner is a resident of the County of Rensselaer and is a minor over four-
 teen years of age and was years of age on the day of
, 19.., and resides with at; that
 (was) is the father of your petitioner and is now living
 and resides at; that (was) is the mother of your

petitioner and is now living and resides at; that the only other relatives of said minor residing in said County of Rensselaer are

. That your petitioner is employed by at

That your petitioner is entitled to certain property and estate, to-wit:
 Personal property of the estimated value of \$.....
 Income from real property each year \$.....
 Income from other personal property each under a trust or life estate, the principal of which will not come to the hands of the guardian \$.....

That to protect and preserve the legal rights of your petitioner it is necessary that some proper person should be duly appointed the guardian of person and property during minority. Your petitioner, therefore, suggests subject to the approval of the said Surrogate's Court of the of, in the County of, as such guardian, and prays that the surrogate will make a decree appointing said such guardian. That by reason of the following circumstances the appointment of some person other than the father or mother is desirable and expedient

That there are no other persons than those mentioned who are interested in this application.

Your petitioner further shows that no guardian has been appointed for him either by a court of competent jurisdiction of this State or by the will or deed of the father or mother of your petitioner, nor has h.. any acting guardian in socage or of the person only.

Your petitioner prays that a decree may be made appointing some suitable person h.. general guardian.

And your petitioner will ever pray.

Dated the day of, 192..

.....,
 Petitioner.

(Add verification.)

COUNTY OF RENSSELAER.

....., being duly sworn, doth depose and say that he is acquainted with the property and estate of the above-named minor, and that the same consists of real and personal estate; and that the personal property of the said minor does not exceed the sum of dollars, or thereabouts, and that the annual rents and profits of the real property of said minor do not exceed the sum of dollars, or thereabouts.

Sworn to before me this }
 day of, A. D. 192.. }

STATE OF NEW YORK, }
 Rensselaer County. } ss.:

I,, do hereby consent to be appointed the guardian of the person and estate of the above-named minor, during minority,

and do solemnly swear and declare that I am a resident of the
of, in the County of Rensselaer, and that my post office address
is, that I am over the age of twenty-one years, and that I will
well, honestly and faithfully discharge the duties of guardian of the person
and property of said according to law.

Sworn to before me this }
day of, A. D. 192.. }

FORM No. 209.

Waiver of Issue and Service of Citation.

[§ 177, ¶ 96]

SURROGATE'S COURT, County of New York.

In the matter of the application for letters of
guardianship of the person and estate of
.....
Minor.

The undersigned of the minor above-named, do hereby consent
and pray that be appointed the general guardian of the person
and estate of said minor, and do hereby waive the issue and service of a citation
herein.

Dated, New York,, 192..

(Add acknowledgment.)

FORM No. 210.

Renunciation of Right to Letters of Guardianship.

[§ 177, ¶ 96]

and

I,, father or mother of, of the of
....., an infant, do hereby renounce all right to letters of guardian-
ship on the person and estate of said infant.

Dated,, 192..

(Add acknowledgement.)

NOTE.—No person can be appointed *ex parte* without the renunciation of the
father and mother or of the one living. The mother must renounce when the
father applies.

FORM No. 211.

Decree Appointing Guardian.

[§ 179, ¶ 97]

(Title.)

(Caption.)

Upon reading and filing the petition of, verified the day of, 192.., praying for the appointment of a general guardian of the person and estate of, a minor; and the surrogate having inquired into the circumstances, and being satisfied that the allegations of the petitioner are true in fact, and that the interests of said infant.. will be promoted by the appointment of a general guardian:

And said having filed a bond with two sureties, as required by law, and which said bond has been duly approved by the surrogate, and having taken and filed the official oath required by law:

It is Ordered, Adjudged and Decreed, that be and he is hereby appointed general guardian of the person and estate of said infant.

Witness, Hon., Surrogate, and the seal of the Court,
[L.S.] the day and year first above written.

.....,
Surrogate.

NOTE.—Same decree may be used whether minor is under or over fourteen.

FORM No. 212.

Order Appointing General Guardian and Designating Associate.

[§ 180, ¶ 98]

(Caption.)

Present: Hon., Surrogate.

In the matter of the application for letters of guardianship of the person and estate of }
..... }
Minor. }

Upon reading and filing the petition of, verified the day of, 192.., it is ordered and decreed, that letters of guardianship of the person and estate of, minor, be and the same are hereby granted to of the County and State of New York, who is hereby appointed the guardian of the person and estate of the said minor, upon h.. taking the official oath as prescribed by law.

It is further ordered and decreed that, Esq., be hereby designated, to collect and receive the moneys and property of his ward jointly with

..... the said guardian who is hereby directed to deposit in the name of such guardian all money or property received as such guardian in, subject to the further order of the Surrogate.

.....,
Surrogate.

FORM No. 213.

Bond of Guardian with Special Affidavit of Justification (N. Y. Co.).

[§ 180, ¶ 98]

Know all Men by these Presents, That we,, are held and firmly bound unto, of the City of New York, a minor, fourteen years of age, in the sum of dollars, lawful money of the United States, to be paid to said minor,, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the day of, one thousand nine hundred and twenty-.....

Whereas, by a decree of the Surrogate's Court of New York County, dated the day of, 192., the above-bounden was appointed general guardian of said minor; now, therefore,
The condition of this obligation is such, that if the above-bounden will, in all things, faithfully discharge the trust reposed in h., and obey all lawful directions of the Surrogate touching the trust; and that he.. will, in all respects, render a just and true account of all money and other property received by h., and of the application thereof, and of h.. guardianship, whenever h.. required so to do by a court of competent jurisdiction, then this obligation to be void, else to remain in full force and virtue.

.....[L. S.]
.....[L. S.]
.....[L. S.]

I know the within-named sureties to be the identical persons that they represent themselves to be, and to be responsible parties, and I believe them to be worth at least \$..... each in good property.

STATE OF NEW YORK, }
County of New York. } ss.:

....., being duly sworn, deposes and says that he is one of the sureties named in the annexed bond, that he resides at No. street, in the, that he is a holder, and that he owns the following property consisting of, and that the same is of the value of not less than dollars, and is subject to no incumbrance except a mortgage of, and that there are no unsatisfied judgments or executions against him, and that he is under no recognizance, nor

is he upon any bond, undertaking or written obligation whatever, and that he is worth in good property, exclusive of property exempt by law from levy and sale under an execution, not less than dollars over and above all debts, liabilities and lawful claims against him, and all liens, incumbrances and lawful claims upon his property.

Sworn to before me this }
day of, 192.. }

.....,

Surety.

(Add second and third justification, as may be necessary.)

(Add acknowledgment.)

FORM No. 214.

Bond of Guardian.

[§ 180, ¶ 98]

Know all Men by these Presents, that we,, are held and firmly bound unto, in Rensselaer County, a minor, in the sum of dollars, lawful money of the State of New York, to be paid to the said, certain attorney, executors, administrators or assigns, and to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of, in the year of our Lord, one thousand nine hundred and

The condition of this obligation is such that if the above-bounden, as guardian of the person and estate of said will in all things, faithfully discharge the trust reposed in and obey all lawful directions of the Surrogate touching the trust, and that he will, in all respects render a just and true account of all money and other property received by, and of the application thereof, and of guardianship, whenever he is required so to do by a court of competent jurisdiction, then this obligation to be void, otherwise to remain in full force and virtue.

.....
.....

(Each surety should qualify in the penalty of the bond.)

.....

(Add second or other qualification as may be necessary.)

(Add acknowledgment.)

I approve of the above bond this day of, 192..

.....,

Surrogate.

NOTE.—No bond required when associate is appointed.

FORM No. 215.**Limited Letters of General Guardianship.**

[§ 181, ¶ 98]

Use any form of general letters of guardianship, and add at the end thereof as follows:

Except that, security having been given and accepted for the sum of dollars only, these letters are limited and restricted to the receiving only the following described personal property and income, namely,, and you are hereby restrained from receiving any other personal property until the further order of this court.

FORM No. 216.**Letters of General Guardianship, No Associate.**

[§ 180, ¶ 96]

THE PEOPLE OF THE STATE OF NEW YORK.

To, Send Greeting:

Whereas, an application, in due form of law, has been made to our Surrogate of the County of New York, to have said appointed the general guardian of, an infant.

And Whereas, said has taken and filed the oath of office, and has filed a bond, pursuant to law, for the faithful discharge of h.. duty as such general guardian; and we being satisfied of the sufficiency of said bond, and that said is a good and reputable person, and is in every respect competent to have the custody of the person and estate of said infant, do by these presents allow, constitute and appoint you, the said the general guardian of the person and estate of said infant during h.. minority, hereby requiring you, the said general guardian, to safely keep the real and personal estate of said infant which shall hereafter come to your custody, and not suffer any waste, sale or destruction of the same, but to keep up and sustain lands, tenements and hereditaments, by and with the rents, issues and profits thereof, or with such other moneys belonging to as shall come to your possession, and to deliver the same to when becomes of full age, or to such other guardian as may be hereafter appointed, in as good order and condition as you received the same, and also to render a just and true account of all moneys and property received by you, and the application thereof, and of your guardianship in all respects, to any court having cognizance thereof, when thereunto required.

In Testimony Whereof, we have caused the seal of office of the Surrogate's Court of the County of New York to be hereunto affixed.

Witness, Honorable, a Surrogate of said County, at the County of New York, the day of, in the year of our Lord, one thousand nine hundred and

Annex copies of §§ 190, 191, Sur. Ct. A. Clerk of the Surrogate's Court.

This form is used as to infants both under and over 14.

FORM No. 217.**Letters of General Guardianship, Under Fourteen, Associate Appointed.**

[§ 180, ¶ 98]

THE PEOPLE OF THE STATE OF NEW YORK.

To, Greeting:

Whereas, a petition has been presented to the Surrogate's Court of the County of New York, praying for the appointment of a general guardian of the person.. and property of infant.,

And Whereas, such proceedings were had before the said Surrogate upon the said petition, that on the day of, 191., it was decreed that be appointed general guardian of the person.. and property of the said infant., and that the general guardian, jointly with collect and receive the moneys and property of the said infant., and that all such moneys and property, so far as same are conveniently capable of deposit, be deposited in the name of such general guardian, subject to the order of the Surrogate, with certain depositaries, therein named, we do by these presents constitute and appoint you the said general guardian of the person and property of the said infant.. during minority, or until another guardian shall be appointed, but only according to the limitations contained in said decree.

In Testimony Whereof, we have caused the seal of the Surrogate's Court [L. S.] of New York County to be hereunto affixed.

Witness, Honorable, a Surrogate of our said County of New York, the day of, 19..

.....
Clerk of the Surrogate's Court.

Annex copies of §§ 190, 191, Sur. Ct. A.

This form is used in cases of infants both under and over 14.

FORM No. 218.**Letters of General Guardianship, No Associate.**

[§ 180, ¶ 96]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God, Free and Independent.

To of the of, in the County of Rensselaer, send Greeting:

Whereas, of the of, in the County of Rensselaer aforesaid, of, a minor the age of fourteen years, hath lately made application unto,

our Surrogate of the County of Rensselaer, at a Surrogate's Court by him held, at the City of Troy, in the County of Rensselaer and State of New York, and prayed that a suitable and proper person might be constituted and appointed general guardian of said minor, whereupon such proceedings were further had, according to the form of the statutes of the State of New York, in such case made and provided, that an order was duly made and entered by our Surrogate's Court, that be appointed guardian of said minor, on entering into and executing and filing with the Surrogate's Court a bond to the said minor, with good and sufficient sureties, to be approved of by our said Surrogate, in the penal sum of dollars, lawful money of the State of New York, conditioned that the said guardian will, in all things, faithfully discharge the trust reposed in, and obey all lawful directions of the Surrogate's Court touching the trust, and that he will, in all respects render a just and true account of all money and other property received by and of the application thereof, and of guardianship, whenever he is required so to do by a court of competent jurisdiction.

And Whereas, the said has on this day of, in the year of our Lord, one thousand nine hundred and, appeared before our said Surrogate's Court and produced and filed the said bond above required to be given by said general guardian, executed in due form of law, with good and sufficient sureties, and it having been satisfactorily made to appear that the said minor was years old on the day of, last past, and resides in the said County of Rensselaer, and has no guardian appointed by a court of competent jurisdiction in this State, or otherwise, or by the will or deed of his father or mother;

I, therefore, the said Surrogate, in pursuance and in virtue of the power in me vested by the statutes of the State of New York, do hereby admit, constitute and appoint you the said general guardian of said minor, until the said minor shall arrive at the age of twenty-one years, or until another guardian shall be appointed for the said minor, or until your guardianship by these presents created, shall be legally annulled.

In Testimony Whereof, the said Surrogate hath hereunto set his hand [L.S.] and caused his seal of office to be hereunto affixed.

Witness, Hon., Surrogate of said County of Rensselaer, at the City of Troy, the day of, in the year of our Lord, one thousand nine hundred and

.....,

Surrogate.

Attach copies of §§ 190, 191, Sur. Ct. A.

NOTE.—These letters may be used whether the infant is under or over fourteen.

FORM No. 219.

Petition for Issue of Letters of Testamentary Guardianship.

[§ 188, ¶ 100]

(Title.)

To the Surrogate's Court of the County of New York:

Whereas, by and under the last will and testament of, deceased, which said last will and testament was duly admitted to probate on the day of, 19.., I am named as testamentary guardian of the person and estate of, minor child.... of said deceased:

Now, I,, of do hereby accept the appointment of such testamentary guardian, and do consent to act as such during the minority of said, the minor aforesaid, and pray that letters of testamentary guardianship, may issue to me in pursuance of said appointment.

Dated, New York, this day of, 19..

(Add acknowledgment and oath of guardian.)

FORM No. 220.

Order that Letters of Testamentary Guardianship Issue.

SURROGATE'S COURT, Rensselaer County.

In the matter of the guardianship of the person and estate of, An Infant.	}
---	---

....., whose post office address is, having applied for letters of testamentary guardianship of the person and estate of, an infant; and it appearing that the said applicant has been duly named as the testamentary guardian of the person and estate of said infant by the will of, the of said infant, which will has been duly admitted to probate and recorded in the Surrogate's Office of Rensselaer County; and it further appearing that there is no surviving parent of said infant (or that the said applicant is the surviving parent of said infant); and that the said applicant has duly qualified as such testamentary guardian by taking and filing his oath of office, and a bond duly approved by this court;

Now, on motion of, attorney for said applicant,

It is ordered, that letters of testamentary guardianship upon the person and estate of the said infant be issued to said

.....,
Surrogate.

NOTE.—Where appointment is by deed, the same general form may be used.

FORM No. 221.

Order Allowing Appointment of Testamentary Guardian.

[§ 188, ¶ 100]

At a Surrogate's Court, held in and for the County of
Rensselaer, in the Surrogate's Office, in the City of
Troy, N. Y., on the day of January, 192..

Present: Hon., Surrogate.

In the matter of the testamentary guardianship	}
of, daughter of,	
Deceased.	

Whereas, it appeared from the petition of, verified, 192.., and heretofore filed herein, that late of the City of Troy, County of Rensselaer, N. Y., deceased, by his last will and testament did nominate and appoint of the said City of Troy, guardian of the person and estate of his above-named daughter,, and

Whereas, the said died, 192.., and his last will and testament was duly admitted to probate, 192.., by a decree of Rensselaer County Surrogate, and letters testamentary thereunder were duly issued to, who has qualified and is acting as such;

And the said, the mother of said infant, having petitioned for her appointment as such testamentary guardian of said infant daughter,, under appointment in said last will and testament contained, and having previously taken and filed her official oath and bond as required by law;

And said petitioner appearing by, her attorney, it is hereby

Ordered, Adjudged and Decreed that of the said City of Troy, N. Y., be and she is hereby appointed testamentary guardian of the person and estate of said

.....,

Surrogate.

FORM No. 222.

Order Allowing Appointment of Testamentary Guardian.

[§ 188, ¶ 100]

At a Surrogate's Court held in and for the County of
Rensselaer, at the Court House in the City of Troy,
N. Y., on the day of, 192..

Present: Hon., Surrogate.

In the matter of the testamentary guardianship of, children of, Deceased.	}
---	---

Whereas, it appears from petition of, verified, 19... , and heretofore filed herein, that , late of the Town of Schodack, County of Rensselaer, N. Y., deceased, by his last will and testament did nominate and appoint, of the Town of East Greenbush, N. Y., the guardian of the person and estate of his above-named minor children;

And Whereas, said, died, 192.. , and his last will and testament was duly admitted to probate, 192.. , by decree of Rensselaer County Surrogate, and letters testamentary thereunder were granted to, and he has qualified and is acting as such;

And it also appearing therefrom that the mother of said minor children,, died in the Town of East Greenbush,, 1917, and the Surrogate having inquired into the circumstances and being satisfied that the mother and father of said infants are dead;

And the said having petitioned for his appointment as such testamentary guardian of said infant children under appointment in said last will and testament contained, and having previously taken and filed his official oath as required by law; and petitioner appearing by, his attorneys, it is hereby

Ordered, Adjudged and Decreed, that of the Town of East Greenbush, be and he is hereby appointed testamentary guardian of the person and estate of said

Witness, Hon., Surrogate, and the seal of the court, the
day and year first above written.

.....,
Surrogate.

FORM No. 223.

**Petition of Person Nominated as Testamentary Guardian to be Relieved
from Default in Qualifying.**

[§ 188, ¶ 100]

SURROGATE'S COURT, County of Rensselaer.

In the matter of the testamentary guardianship of, children of, Deceased.	}
---	---

To the Surrogate's Court of the County of Rensselaer:

The petition of, residing at the Town of East Greenbush, County of Rensselaer and State of New York, respectfully shows:

That, mother of the above-named infants, died in the Town of East Greenbush, N. Y.,, 1917, leaving her surviving her husband,, and her minor children,

That died testate at the Town of Schodack,, 192..., leaving him surviving as his only heirs-at-law and next of kin the said infants. The petitioner is the executor named in the last will and testament of said, deceased. Said will was duly admitted to probate by the Surrogate of the County of Rensselaer by decree granted, 192..., and entered on the same day, and that letters testamentary thereunder were duly issued to petitioner, and that he duly qualified and is now acting as such executor.

Petitioner further shows that under and by virtue of the "Third" paragraph of will of said, deceased, petitioner, was constituted and appointed testamentary guardian of the infant children of said, deceased, and requested therein by said testator to act as such guardian.

Petitioner further shows that he has never qualified as such testamentary guardian by filing the official oath therefor within the time allowed by statute, but that he has assumed and performed the duties and obligations of testamentary guardian toward the said infants, and that the reason for delay in qualifying and filing his oath as testamentary guardian is that he was uncertain as to whether or not he should be able to act as such guardian of said several infants, and (state fully any other or further reasons why guardian did not qualify) that no other persons than those mentioned are interested in this application.

Your petitioner prays that decree be entered appointing him testamentary guardian of the above-named infants, and that he have leave to qualify as such guardian and file his official oath therefor as of the proper time, and that his time for so doing be extended ten days after the granting of the order herein applied for.

Dated, at Albany, N. Y.,, 192...

(Add verification.)

(Annex oath of testamentary guardian.)

.....,

Petitioner.

FORM No. 224.**Order Relieving Default of Testamentary Guardian.**

[§ 188, ¶ 100]

At a Surrogate's Court held in and for the County of Rensselaer at the Surrogate's Office in the City of Troy, N. Y., on the day of, 192..

Present: Hon., Surrogate.

In the matter of the testamentary guardianship	}
of, children of	
and, Deceased.	

On reading and filing petition of, verified the day of, 192.., praying for a decree appointing him testamentary guardian of, children of and, deceased, and for leave to qualify as such, and that his time to qualify and to file his oath of office as such guardian be extended for a period of ten days from the date of this order;

Now, on motion of, attorneys for petitioner, it is

Ordered and Decreed, that said be appointed testamentary guardian of, and that he have leave to qualify as such testamentary guardian, and that he file his oath of office therefor within ten days from the date of granting this order.

.....,
Surrogate.

FORM No. 225.**Consent and Qualification of Testamentary Guardian.**

[§ 188, ¶ 100]

To the Surrogate's Court of the County of New York:

Whereas, by and under the last will and testament of, deceased, late of the County of New York, which said last will and testament was duly admitted to probate on the day of, 191.., I am named as testamentary guardian of the person and estate of minor child, ... of said deceased;

Now I,, do hereby accept the appointment of such testamentary guardian, and do consent to act as such during the minority of said,

the minor aforesaid, and pray that letters of testamentary guardianship may issue to me in pursuance of said appointment.

Dated, New York, this day of, 192..

(Add acknowledgment.)

County of New York, ss.:

I,, the testamentary guardian named in the last will and testament of, late of the County of New York, deceased, do depose and say, that I am a resident of, over twenty-one years of age, and that I will well, faithfully and honestly discharge the duties of testamentary guardian of, the minor child... of said deceased.

Sworn to before me this }

Day of, 192.. }

FORM No. 226.

Letters of Testamentary Guardianship.

[§ 188, ¶ 100]

THE PEOPLE OF THE STATE OF NEW YORK.

To, the testamentary guardian.. named in the last will and testament of, deceased, for infant child of said deceased, send Greeting:

Whereas, the last will and testament of said, deceased, was duly admitted to probate by the Surrogate of the County of Bronx, on the day of, one thousand nine hundred and twenty, in and by which said named as the testamentary guardian.. of the said infant;

And Whereas, said ha.... duly qualified within the time required by law; and we being satisfied that said good and reputable person.., and in every respect competent to have the custody of the person and estate of said infant, do by these presents allow, constitute and appoint you the said the testamentary guardian.. of the person and estate of said infant, during h.... minority, hereby requiring you the said guardian.. to safely keep the real and personal estate of said infant, which shall hereafter come to your custody, and not suffer any waste, sale or destruction of the same, but to keep up and sustain lands, tenements and hereditaments, by and with the rents, issues and profits thereof, or with such other moneys belonging to as shall come to your possession, and to deliver the same to when becomes of full age, or to such other guardian as may hereafter be appointed, in as good order and condition as you receive the same, and also to render a just and true account of all moneys and property received by you, and the application thereof, and

of your guardianship in all respects, to any court having cognizance thereof when thereunto required.

In Testimony Whereof, we have caused the seal of the office of the Surrogate's Court of the County of Bronx to be hereunto affixed.

Witness, Hon., Surrogate of said County, at the County
[L. S.] of Bronx, the day of, in the year of our Lord one
thousand nine hundred and twenty.

.....,

Clerk of the Surrogate's Court.

Annex copies of §§ 190, 191, Sur. Ct. A.

Notice.—Guardians changing their residence, will please notify the clerk immediately. Surrogate's Office, County of Bronx, New York City.

FORM No. 227.

Petition for Ancillary Guardianship.

[§ 184, ¶ 99]

SURROGATE'S COURT, Rensselaer County.

In the matter of the person and estate of
.....
infants..

The petition of, of the City of Chicago, County of Cook and State of Illinois, respectfully shows to this court and alleges:

First.—That your petitioner is the general guardian of the property of, minors, and was duly appointed by the Probate Court of the County of Cook, State of Illinois, a court of competent jurisdiction under the laws of the State of Illinois, where your petitioner and said wards reside, and your petitioner has there given security in at least twice the value of the personal property, which said wards now have and to which said wards are entitled, to wit, the sum of two thousand dollars. That said wards are not entitled to the rents and profits of any real estate, and the accompanying exemplified copy of letters of guardianship, granted to your petitioner in the State of Illinois, shows that he has given the security required by section 184 of the Surrogate's Court Act. That pursuant to the laws of the State of Illinois your petitioner is entitled to the possession of the property and estate of said minors.

Second.—And your petitioner further shows that there is property in the State of New York amounting to the sum of \$866 to which each of said minors is entitled to a one-third share.

Third.—That your petitioner further shows that there are no debts due from the estate of said minors to any resident of the State of New York.

Fourth.—That there are no other persons interested in this application.
Wherefore, your petitioner prays that a decree may be made granting ancillary letters of guardianship on the property of, minors, to your petitioner, and that such ancillary letters of guardianship be accordingly issued to him.

.....,
Petitioner.

(Add verification and oath.)
SURROGATE'S COURT, Rensselaer County.

In the matter of the person and estate of }
..... }
infants. }

STATE OF NEW YORK, }
County of Rensselaer, } ss.:
City of Troy, }

....., being duly sworn, says that she resides in the City of Troy, N. Y., and is more than twenty-one years of age, and is a sister of, the deceased mother of; that the afforesaid minors were born in the City of Troy, N. Y., but for the last five years have been residents of the City of Chicago, Illinois; that deponent is intimately acquainted with the affairs of said minors; that deponent knows that there are no debts due from the estates of said minors to any residents of the State of New York; that deponent has in her possession at the present time the money which is to be paid over to the ancillary guardian of said minors when he is appointed, and deponent further says that her acquaintance with the affairs of said minors is such that if there were any debts due any resident of the State of New York from the estate of said minors deponent would have knowledge thereof.

.....
Subscribed and sworn to before me, }
this day of, 192.. }
.....,
Notary Public.

FORM No. 228.
Letters of Ancillary Guardianship.

[§ 185, ¶ 100]

THE PEOPLE OF THE STATE OF NEW YORK.

To, Send Greeting:
Whereas,, who has been duly appointed the general guardian of the property of, minor..., by a court of competent jurisdic-

tion within the where the said minor resides, has presented to the Surrogate's Court of the County of New York a petition for h.. appointment as ancillary guardian of said minor;

And Whereas, one of our Surrogates has, on the day of, 192.., made a decree granting such petition, and directing that such ancillary letters of guardianship issue to the petitioner.

We, in pursuance of said decree, do by these presents issue these letters, constituting and appointing you, the said, the ancillary guardian of said minor.., until another guardian shall be appointed, hereby requiring you, the said guardian, to safely keep the real and personal estate of said minor.. which shall hereafter come to your custody, and not suffer any waste, sale or destruction of the same, but to keep up and sustain lands, tenements and hereditaments, by and with the rents, issues and profits thereof, or with such other moneys belonging to as shall come to your possession, and deliver the same to when becomes of full age, or to such other guardian as may be hereafter appointed, in as good order and condition as you received the same, and also to render a just and true account of all moneys and property received by you, and the application thereof, and of your guardianship in all respects to any court having cognizance thereof, when thereunto required.

In Testimony Whereof, we have caused the seal of office of the Surrogate's Court of the County of New York to be hereunto affixed.

Witness, Hon., a Surrogate of said county, at the City of [L. S.] New York, the day of, 192...

.....,
Clerk of Surrogate's Court.

FORM No. 229.

Order Granting Ancillary Guardianship.

[§ 185, ¶ 100]

At a Surrogate's Court held in and for the County of Rensselaer, at the Surrogate's Office in the City of Troy, N. Y., on the day of, 192...

Present: Hon., Surrogate.
SURROGATE'S COURT, Rensselaer County.

In the matter of the person and estate of }
..... }
infants. }

On reading and filing the petition duly verified by, on the day of, 192.., from which and from the exemplified copy of

letters of guardianship accompanying said petition, and also the affidavit of, the Surrogate is satisfied that said petitioner is the general guardian in Cook County, City of Chicago, State of Illinois, of the property of, likewise residing at Chicago, County of Cook, State of Illinois, and was duly appointed in such State by a court of competent jurisdiction, to wit, the Probate Court of the County of Cook, State of Illinois, and is, pursuant to the letters of such court, entitled to the possession of the personal estate of the aforesaid minors; that said has given in the place where said wards reside security in at least twice the value of the personal property of said wards and upon said papers presented, the Surrogate being satisfied that the case is within section 184 of the Surrogate's Court Act and that it will be for the interests of the said minors that ancillary letters of guardianship should be issued to the petitioner, as in said petition prayed for.

And the Surrogate having inquired whether any debts are due from the estate of said minors to residents of the State of New York, and it appearing that there are no such debts.

Now, on motion of, attorney for petitioner, it is

Ordered and Decreed, that the prayer of said petitioner be granted and that ancillary letters of guardianship be granted to said petitioner upon the person and estate of

.....,
Surrogate.

FORM No. 230.

Petition to be Allowed to Withdraw Money for Use of Infant.

SURROGATE'S COURT, County of Bronx.

In the matter of the guardianship of
....., an infant.

To the Surrogate's Court of the County of Bronx:

The joint petition of the above-named infant and of, respectfully shows:

I. That on the day of, 192., letters of guardianship of the person and estate of the said infant were issued by this Court to said, who resides at, and is

II. That said infant is years of age and resides at, with

III. That the

IV. That there is on deposit in said guardian's name, for said infant, in, as appears by book number, the sum of (.....) dollars; that said letters of guardianship provide in effect that said moneys may not be withdrawn without an order of the Surrogate.

V. That no previous order for the application of said infant's property, or of any portion thereof, has been made, nor has any been applied for, nor has any previous application been made for the order hereby prayed for, as your petitioners verily believe.

That there are no other persons than those before mentioned interested in this application.

Wherefore your petitioners pray that an order be made and entered by this Court permitting said guardian to draw

Dated, New York,

.....,
Guardian.
.....,
Ward.

STATE OF NEW YORK, }
County of Bronx, } ss.:

..... being duly sworn, deposes and says:

I am the petitioner above named; I have read and I have subscribed the foregoing petition and know its contents and the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

Sworn to before me, this }
day of, 192.. }

.....

STATE OF NEW YORK, }
County of Bronx, } ss.:

.....being duly sworn, deposes and says:

I am the petitioner above named; I have read and I have subscribed the foregoing petition and know its contents and the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

Sworn to before me, this }
day of, 192.. }

.....

FORM No. 231.**Order Permitting Withdrawal of Funds for Use of Infant.**

At a Surrogate's Court, held in and for the County of
Bronx, at the Bergen Building, No. 1918 Arthur Avenue
in said County, on the day of,
192...

Present: Hon., Surrogate:

In the matter of the guardianship of
....., an infant.

Upon reading and filing the annexed petition of, verified the
..... day of, 192...

It is Ordered that said be and he hereby is permitted to draw
from the moneys deposited to h.. credit as such guardian in,
under account number, and said depository is hereby permitted to
pay therefrom,

.....,
Surrogate.

FORM No. 232.**Petition of Guardian and Late Infant for Payment and Discharge.**

SURROGATE'S COURT, County of Bronx.

In the matter of the guardianship of
....., an infant.

To the Surrogate's Court of the County of Bronx:

The joint petition of (guardian) and of the above-named
....., heretofore an infant, respectfully shows:

I. That on, 19.., letters of guardianship of the person and
estate of said (infant) were duly granted and issued by this
court to the said

II. That said (guardian) resides at and said
..... (infant) resides at

III. That said letters of guardianship provide that all moneys of said infant
be collected by said guardian jointly with one, Esq., and deposited
in said guardians name in, subject to the order of the Surrogate
of the County of Bronx, a bond having been dispensed with in and by the decree

appointing such guardian; and said moneys cannot be withdrawn without such order.

IV. That all of the moneys of said infant, amounting to dollars (\$.....), are so deposited in said bank, the number of the account being

V. That said (infant) was born on, 19.., and is now over 21 years of age.

VI. That said guardian is willing to pay the entire sum on deposit without deduction for commissions or otherwise to h.. former ward, who is willing to receive the same and to waive all form and manner of accounting on the part of said guardian, of h.. acts and proceedings as such and to release and discharge h.. of and from all liability for and on account of h.. acts as such guardian upon receipt of the aforesaid sum; and said former infant's release under seal to that effect, also releasing and discharging said depository and said from all liability in connection with said guardianship, and bearing even date herewith, duly acknowledged and certified is hereto annexed and made part of this application.

VII. That there are no persons than those hereinbefore mentioned, interested in this proceeding; that said has not assigned or otherwise disposed of said moneys or any part thereof.

VIII. That no previous application for the relief hereby prayed for has ever been made.

Wherefore it is prayed that an order be entered authorizing the payment of the moneys so deposited, to the said (infant).

Dated, New York,, 192..

.....,
Guardian.
.....,
Ward.

..... (guardian), having been appointed the guardian of my person and estate by decree of the Surrogate's Court, County of Bronx, State of New York, and letters of guardianship issued in pursuance of said decree on, 19..; and, having attained my majority, said guardian having satisfactorily accounted to me for all moneys and other property received and held by h... as such, or for which ..he.. may be accountable, and it appearing that there remains due me from said guardian the sum of dollars (\$.....), and no other property, which said sum is deposited in the (account number) in the name of said guardian as such; and my said guardian desiring to pay over said sum without deduction for commissions;

Now Therefore, upon the payment to me to be made, and only when made, of the said sum of money so deposited, I, the undersigned do remise, release and forever discharge the said guardian, and also appointed to receive and collect my property jointly with said guardian during my minority, and each of their heirs, executors and administrators, and said, the depository of my moneys, and its successors, of and from all manner and form of reckoning or accounting, and claims and demands whatsoever, which against

them or any of them I ever had, now have, or which I or my heirs, executors, administrators or assigns hereafter can, shall or may have, for, upon or by reason of any matter, cause or thing whatsoever relating to said guardianship; and I do hereby waive the issue and service of a citation or other process in any proceeding to attend the judicial settlement of the accounts of said guardian, or in any proceeding taken by said guardian for the purpose of securing his final release and discharge.

In Witness Whereof, I have hereunto set my hand and affixed my seal,
this day of, 192..

.....,
Late Infant.

STATE OF NEW YORK, }
County of Bronx, } ss.:

On this day of, 192..., before me personally came and appeared, to me personally known, and known to me to be the same person mentioned and described in and who executed the foregoing release of guardian, and who to me duly acknowledged that ..he executed the same.

STATE OF NEW YORK, }
County of Bronx, } ss.:

....., being duly sworn, deposes and says:

I am the petitioner.. above-named; I have read and I have subscribed the foregoing petition and know its contents and the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

Sworn to before me this }
day of, 192.. }

.....

STATE OF NEW YORK, }
County of Bronx, } ss.:

....., being duly sworn, deposes and says:

I am the petitioner.. above-named; I have read and I have subscribed the foregoing petition and know its contents and the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

Sworn to before me this }
day of, 192.. }

.....

FORM No. 233.

Order Permitting Payment to Late Infant.

At a Surrogate's Court, held in and for the County of
Bronx, at the Bergen Building, No. 1918 Arthur Ave-
nue in said County on the day of, 192..

Present: Hon., Surrogate.

In the matter of the guardianship of
....., an infant.

Upon reading and filing the annexed joint petition of the above-named
..... and of the guardian of h.. person and estate,
verified, 192.., and the conditional release executed and acknowl-
edged by said on said day, and it appearing that said
has arrived at the age of twenty-one years, it is

Ordered, that said be and ..he is hereby permitted to draw h..
check, draft, voucher or order upon the funds to credit as such guardian
in, (account number) to the order of said, for
the sum of (.....) dollars, and that said, be
and it is hereby permitted, upon said check, draft, voucher or order to pay said
sum to the said

Enter:

FORM No. 234.

**Affidavit of Guardian in Place of Annual Account, When No Other
Property or Income Has Been Received Since Last Account.**

[§ 190, ¶ 101]

SURROGATE'S COURT, County of New York.

In the matter of the annual inventory and
account of, general (testamen-
tary) guardian of, infant.

County of New York, ss.:

I,, residing at No. general
testamentary guardian of
..... infant., do depose and say that on the day of,
19.., I was duly appointed the general
testamentary guardian of
a Surrogate of
infant., by the Supreme Court the County of New York; that no money or
property of any description has come into my hands, or been received by any

other person by my order or authority for my use since the date of my (appointment or last account) as such guardian, and that there is no money or property of any description remaining in my hands as guardian of said infant on December 31, 192..

*Name of Sureties.

Residence of Sureties.

.....

Sworn to before me this }
day of, 192.. }

.....

FORM No. 235.

Annual Inventory and Account of Guardian.

[§ 190, ¶ 101]

SURROGATE'S COURT, County of New York.

In the matter of the annual inventory and
account of, guardian of
....., infant.

I,, residing at No., guardian of, infant.., do make, render and file the following inventory and account for the year ending December 31, 19..

On the day of, 191.., I was duly appointed the guardian of, infant.., by one of the surrogates of the County of New York.

Schedule A, hereinafter set forth (as part of said inventory), contains a full and true statement and description of each article or item of personal property and the value thereof, and each sum of money, either principal or interest of said infant received by me since my appointment or my said last account to December 31, 19..

Schedule B, hereinafter set forth (as part of said inventory), contains a full and true statement and list of the articles or items of said property or moneys remaining in my hands December 31, 19..

Schedule C, hereinafter set forth (as part of said inventory), contains a full and true statement of the manner in which I have disposed of the articles or items of said property or money not remaining in my hands December 31, 19..

Schedule D, hereinafter set forth (as part of said inventory), contains a full and true statement of the amount and nature of each investment of money made or held by me, and of the manner in which the fund is at present invested and the name of the bank in which any moneys are at present deposited.

* The names and residences of the Sureties on his bond; if natural persons whether they are living, and whether the security of the bond has become impaired.

Said Schedules A, B, C and D constitute said inventory and are respectively signed by me.

Schedule E, hereinafter set forth and signed by me, is a full and true summary in form of debtor and creditor, of all my receipts and disbursements of money and of investments made or held by me since my appointment or since my account made for the year 19.., dated, and distinctly states the total amount of the balance remaining in my hands as shown by the last account; and the total amount of the balance in my hands to be charged to me in the next year's account, is the sum of dollars.

Schedule F shows the name and residence of each surety on the bond if a natural person, whether he be living at the time of the rendition of the account; and whether the condition of any surety on the bond has become so impaired as to materially affect his financial responsibility.

All of which is respectfully submitted.

Dated,, 192..

.....

NOTE.—Follow with schedules, each signed by the guardian.

COUNTY OF NEW YORK, ss.:

I,, being duly sworn, do depose and say, that I am the guardian of, infant; that the foregoing inventory and account contain to the best of my knowledge and belief a full and true statement of all my receipts and disbursements on account of my ward; and of all money and other personal property of my ward which have come to my hands or have been received by any other person by my order or authority or for my use since and of the value of all such property, together with a full and true statement and account of the manner in which I have disposed of the same, and of all the property remaining in my hands at the present time; and a full and true description of the amount and nature of each investment made by me since and that I do not know of any error or omission in the inventory or account to the prejudice of my ward.

.....

Sworn to before me, this }
day of, 192.. }

.....

FORM No. 236.

Sample Schedules.

SCHEDULE A.

Interest, received from to July 1st, 19.., dollars.

Interest, received from to January 1st, 19.., dollars.

.....,

Guardian.

SCHEDULE B.

Cash in bank dollars.
Other property or investments, consisting of, dollars.
.....,
Guardian.

SCHEDULE C.

Expended, pursuant to an order of the Surrogate, dated, for
the support, maintenance and education of my ward dollars.
.....,
Guardian.

SCHEDULE D.

\$..... deposited in my name as guardian in (account
No.), subject to the order of the Surrogate.
No real property and no investments.
.....,
Guardian.

SCHEDULE E.

	Dr.	Cr.
Balance remaining in my hands, as shown by my last account, dated, 19..,	\$	
I charge myself with the total balance of receipts as shown in Schedule "A"	\$	
I credit myself with the total balance of disbursements, as shown in Schedule "C"		\$
Balance remaining in my hands, as shown in Schedule "B," to be charged to me in my next account.....		\$
	<hr/>	<hr/>
	\$	\$
.....,		
		Guardian.

SCHEDULE F.

(Bond dispensed with) or (give names and post-office addresses of sureties,
whether both are alive and whether the security has been impaired by change
in financial condition of sureties).
.....,
Guardian.

FORM No. 237.**Examination of Guardian's Accounts—Oath.**

[§ 192, ¶ 101]

By section 192 the Surrogate is required to designate a clerk in his office or some other person to examine guardians accounts in the month of January of each year, or make such examination himself. When he makes such designation the following forms may be used:

SURROGATE'S COURT, }
County of Rensselaer, } ss.:

In compliance with section 192 of the Surrogate's Court Act, I,, a Clerk in the Surrogate's Court of the County of Rensselaer, specially appointed by the Surrogate of said County to examine the accounts and inventories of general guardians which, pursuant to section 190 of the Act, aforesaid, should be filed in this Court in the month of January, 192.., do solemnly swear that I will well and faithfully examine said accounts and inventories and make a true report thereon to the Surrogate in accordance therewith.

Sworn to before me, this }
day of, 192.. }

.....
.....

FORM No. 238.**Report of Examiner of Guardian's Accounts.**

[§ 192, ¶ 101]

SURROGATE'S COURT, of the County of New York.

In the matter of the annual inventory and
account of, guardian of
....., an infant.

County of New York, ss.:

....., being duly sworn, says that he is a clerk in the office of the Surrogate of the County of New York, specially appointed and designated by the Surrogate of said County to make the examination provided for by section 192 of the Surrogate's Court Act as to the accounts and inventories of guardians required to be filed in the month of January, 192.., pursuant to sections 190-191 of said Act, and that he duly took and filed the oath prescribed by said section 192, and duly made and filed with said Surrogate a certificate and report of the

examination made by him pursuant to said appointment and designation.

That was on the day of, 19.., duly appointed guardian of the property of, infant, by letters of guardianship duly issued from said court. That deponent in the course of said examination has made examination and inquiry respecting the filing by said guardian of the annual account and inventory required by said section 190 to be filed in the month of January, 192.., and finds and states, and he has so certified and stated in the aforesaid certificate and report, that said guardian has not filed such account and inventory.

Sworn to before me, this }

day of, 192.. }

.....

FORM No. 239.

Order Appointing Special Guardian Upon Filing of Examiner's Report.

[§ 193, ¶ 101]

At a Surrogate's Court of the County of New York, held
at the Hall of Records in the County of New York, on
the day of, in the year one thou-
sand nine hundred and twenty.

Present: Hon., Surrogate.

In the matter of the annual inventory and
accounting of, guardian, of
....., infant.

It appearing from an examination duly made under my direction, pursuant to section 192 of the Surrogate's Court Act, as to the filing of their annual accounts and inventories in the month of January, 192.., by guardians of the estates of their wards, theretofore appointed by said court, that the said, the guardian of the property of, infant, has failed and omitted to file the annual account or inventory required to be filed in the month of January, 192..

It is ordered that be and he is hereby appointed the special guardian of the said for the purpose of filing a petition in his behalf for the removal of his said guardian and prosecuting the necessary proceedings for the purpose, and such special guardian shall have authority to procure the filing of an amended account or a proper account.

NOTE.—This order may include a direction to bring a proceeding for removal on account of facts set up in the report.

FORM No. 240.

Petition for Appointment of Substituted Trustee.

[§ 168, ¶ 80]

SURROGATE'S COURT, Rensselaer County.

In the matter of the will of	}
Deceased.	

The petition of X. Y. Z., of the of in the County of, New York, respectfully shows to this court:

I. That the will of A. B., late of the of, County of Rensselaer and State of New York, was duly admitted to probate by a decree of this court, on the day of, 192., and recorded in Book No. of Wills, page

II. That C. D. and E. F. were named as executors and trustees in said will.

III. That C. D. died on or about the day of, 192..

IV. That E. F. died on or about the day of, 192., and that there is now no executor or trustee of said will. That there remains nothing uncompleted in connection with said will requiring the appointment of an administrator with the will annexed. That certain uncompleted trusts remain, necessitating, for the execution thereof, the appointment of a trustee in place of the deceased testamentary trustees heretofore named. That of the legatees named in said will there survive, at the date hereof, only H. J. K., who is a of the testator, and G. H., a That L. M., the wife of the testator, is dead. That N. P., unmarried, is dead. That E. F. G. died leaving one child, also deceased, who is survived by G. H. I., J. K. L., and F. X. T., children. That F. X. T., on whose life depends the continuance of the trust, still survives. That H. F. G., named by the testator in a like capacity, is dead. That a copy of the said will is attached to and forms part of this petition, reference to which is here made for the details of the trusts created therein.

Your petitioner further shows that the estate consists of personal property to the amount of \$....., and real property, which he is informed and believes will not, above its incumbrances, exceed in value the sum of \$..... That your petitioner is desirous that some one be appointed to act as trustee under the will of the said deceased to carry out and fulfill the unexecuted trusts, and believes that A. J. K. is a proper and fitting person to so act. That he is over the age of twenty-one years and is a resident of the County of That there are no other persons than those mentioned who are interested in this proceeding.

Wherefore, your petitioner prays that a decree may be made by this court appointing him, the said A. J. K., trustee under the said will to carry out and execute the uncompleted trusts created thereby, and for such further order as the court may deem expedient and proper therein.

Dated, Troy, N. Y.,, 19..

(Add verification.)

FORM No. 241.

Oath of Trustee.

SURROGATE'S COURT, County of New York.

In the matter of proving the last will and
testament of, deceased,
As a will of real and personal property.

County and State of New York, ss.:

I,, trustee named in the last will and testament
of late of the County of New York, deceased, do
depone and say that I am a resident of No. in the Borough of
..... in the City and State of New York; that I am a citizen of the
United States, and am over twenty-one years of age; and that I will well,
faithfully and honestly discharge the duties of trustee under said last will and
testament.

Sworn to this }
day of, 192.. }

Assistant to the Surrogate, N. Y. Co.

FORM No. 242.

Petition for Substituted Trustee for Purpose of Transferring Outstanding Security or Satisfying Mortgage.

[§ 168, ¶ 80]

SURROGATE'S COURT, County of Rensselaer.

In the matter of the will of A. B.,
Deceased.

The petition of C. D., of, in the County of, N. Y.,
respectfully shows to this court:

I. That the will of A. B., late of the of, Rensselaer County, N. Y., was duly admitted to probate by a decree of this court, on the day of, 19.., and recorded in Book No. of Wills, at page

II. That E. F., of, N. Y., was named as executor in said will and that he qualified and acted as such up to the time of his death, which occurred on or about the day of, 192..

III. That on or about the day of, 192.., the said E. F. made application to this court for a judicial settlement of his accounts as executor as aforesaid, and that thereafter and on or about the day of, 192.., a decree of this court was entered judicially settling his accounts and discharging him from any further liability in regard thereto.

IV. That by the seventh clause of the said will, the testatrix gave to her sister E. F. G. the income of the sum of ten thousand dollars to be paid to her so long as she may live.

V. By the eighth clause of the will, she gave, upon the death of her said sister E. F. G., the sum of five thousand dollars of the aforesaid ten thousand dollars, the income of which is directed to be paid to her sister E. F. G., as aforesaid, to her executor in trust to and for the purposes following, to wit: To use the income therefrom for the support and maintenance of X. Y. Z., of, Maryland, daughter of G. and H. Z., until she attains the age of twenty-one years, and upon her attaining that age to pay over to her the said principal sum of \$5,000, but in case of the death of the said X. Y. Z. before attaining said age, leaving issue surviving, she wills and directs that said sum of \$5,000 be paid to such issue.

VI. That the said E. F. G. is dead.

VII. That up to the time of the death of the said E. F. G., the executor paid to her the income of the said \$10,000, and thereafter has paid the income of \$5,000 of the aforesaid \$10,000, as directed by the will, to the said X. Y. Z. during her minority.

VIII. That the said X. Y. Z. is now of full age.

IX. That the said E. F. held as trustee for the benefit of the said E. F. G., and later for the said X. Y. Z., a certain mortgage made by Mary Doe, of the of, County of, New York, and John Doe to A. B., dated, 19.., recorded, 19.., in the office of the register of County, Liber of Mortgages, page, which mortgage was duly assigned to E. F., as trustee under the will of A. B., deceased.

X. That the principal sum as stated in said mortgage was \$10,000, but that prior to the death of the said E. F. G. the said mortgage had been reduced by payments to the sum of \$5,000.

XI. That the remaining sum of \$5,000 has lately been paid by the mortgagor to your petitioner, who is one of the executors of the will of E. F., deceased, and by your petitioner paid to the said X. Y. Z.

XII. That your petitioner is desirous of satisfying said mortgage, which has now been paid in full, and for that purpose prays for his appointment as sub-

stituted trustee under the will of A. B., deceased. That he is over the age of twenty-one years and is a resident of, County of, N. Y. That the trusts created by the seventh and eighth clauses of the said will have all been fulfilled and executed and that there remains nothing further but to properly discharge the said mortgage.

- XIII. That said X. Y. Z. is the only interested party.
- XIV. That a copy of the will of A. B. is attached to and forms part of this petition.

Wherefore, your petitioner prays that a decree may be made by this court appointing him substituted trustee under the said will, for the purpose hereinbefore stated and for such further order as the court may deem expedient and proper therein.

Dated,, N. Y.,, 192..
(Add verification.)

FORM No. 243.

Petition for Order to Serve Incompetent.

[¶ 27]

SURROGATE'S COURT, County of

In the matter of the will of
Deceased.

- The petition of respectfully shows to the court:
- I. That on the day of, 19.., filed a petition in this court praying that be appointed substitute trustee under the will of, deceased, reciting therein all those interested in the said will, and among them, a person of unsound mind, whose committee is
 - II. Your petitioner further shows that under the rules of the State Commission in Lunacy an inmate of a State institution for the insane cannot be served with a citation in certain proceedings, of which this is one, except upon the order of a judge of a court of record, which shows that the judge had notice of the fact that the person sought to be served was at the date of the order an inmate of such institution.
 - III. Your petitioner further shows that the said is an inmate of such institution, to wit, the
- Wherefore your petitioner prays that an order issue from this court to the superintendent or officer in charge of the said institution directing him to permit

the service of the citation and all papers pertaining to the above-entitled matter upon the said

Dated,, 19..

(Add verification.)

ORDER.

(Title.)

(Caption.)

It appearing from the petition of, praying for the appointment of a substituted trustee under the will of, deceased, that, one of the residuary legatees, is a person of unsound mind, and it further appearing that is at the date hereof an inmate of the asylum for the insane at

Now, therefore, it is ordered in compliance with a rule of the State Commission of Lunacy, entitled "In the matter of the service of legal process upon insane patients and the execution of instruments by them," that the superintendent or officer in charge of the aforesaid institution permit the service of the citation and all papers pertaining to the above-entitled matter upon the said

Dated,, 192..

Surrogate.

NOTE.—Better practice would be to obtain such order on a notice of motion.

FORM No. 244.

Order Appointing Substituted Trustee.

[§ 168, ¶ 80]

(Caption.)

SURROGATE'S COURT, Rensselaer County.

In the matter of the will of
Deceased.

A duly verified petition having been on the day of, 192..., filed in this court by X. Y. Z., praying for a decree appointing A. J. K. trustee under the will of A. B., late of the of, deceased, to succeed the trustees named in said will, now deceased, and the court having ordered that (name interested parties) be cited to show cause why he, the said A. J. K., should not be so appointed, and the court having in its discretion dispensed with the citation of all other interested parties, and the petitioner having shown to the satisfaction of the court that of the decedent's estate there remains real and personal property to the value, above its incumbrances, of \$..... (together with the probable amount to be received by any right of

action), and a citation having been issued out of said court directed as stated, and said citation having been returned with proof of the service, or waivers thereof, on all the persons designated, and the petitioner, X. Y. Z., having appeared by his attorney, E. A. Pattison, Esq., and there being no other appearances, no minors and no objections (name minors, if any, and guardian who appeared for them); and it further appearing that said A. J. K. is a proper and competent person to act as such trustee;

It is therefore Ordered, Adjudged and Decreed, that the said A. J. K. shall execute and file with this court a bond, with sufficient sureties, in the penal sum of \$.....; and further, that upon so doing he shall be and hereby is appointed trustee under the will of A. B., deceased.

Dated, Troy, N. Y.,, 192..

.....,

Surrogate.

FORM No. 245.

Bond of Trustee.

[§ 169, §§ 77, 105]

Know all Men by These Presents, That we, of Stamford, Vermont, as principal and and, as sureties, are held and firmly bound unto the People of the State of New York, in the sum of forty thousand dollars (\$40,000), lawful money of the United States, to be paid to the said People, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly and by these presents.

Sealed with our seals and dated the 10th day of October, 192..

Whereas, The said, by order of the Surrogate's Court of the County of Rensselaer, made, 192.., was appointed substituted trustee under the will of, deceased, in the place and stead of, trustee, deceased, upon his giving the bond by said order required;

Now, Therefore, The condition of this obligation is, such, that if the above-bounden shall faithfully discharge the trust reposed in him as such trustee, and obey all lawful decrees and orders of the Surrogate's Court of the County of Rensselaer, or of any other court having jurisdiction thereof, touching the administration of the estate committed to him, then this obligation to be void, otherwise to remain in full force and effect.

Signed, sealed and delivered in presence of

.....[L. S.]

.....[L. S.]

.....[L. S.]

(Add justifications and acknowledgments.)

FORM No. 246.

Petition to Supreme Court for Appointment of Substitute Trustees.

SUPREME COURT, County of Rensselaer.

In the matter of the estate of A. B., <div style="text-align: right;">Deceased.</div>	}
--	---

To the Supreme Court of the State of New York:

The petition of C. D., E. F., G. H., J. K., L. M., N. O. and P. Q., respectfully shows, that heretofore, A. B., of, N. Y., died, leaving a last will and testament, which was duly admitted to probate by and before the Surrogate's Court of the County of Rensselaer, New York, a copy of which will is hereto annexed and made a part hereof. That in and by said will a trust was created, relating to both real and personal property. That the persons interested, for life, in said trust were E. F., one of your petitioners; C. D., one of your petitioners; H. J. K., who died, 19..; A. J. K., who died several years since, and C. E. F., who died several years since. That the only persons now in being interested in said trust estate as cestui que trust, or otherwise, are your petitioners. That the amount of said trust estate, at the present time, as your petitioners are informed and believe, is about the sum of \$..... That of the trustees named in the said will of A. B., J. A. K. and F. O. B. died upwards of five years since and no person was appointed in their place and stead as trustee under the said will. That the said H. J. K. died on, 19.., and that no person has been appointed as trustee under the said will in his place and stead. That your petitioners desire that F. X. T., of, N. Y., and J. A. K., of, N. Y., be appointed as substitute trustees under the said will of A. B. in the place and stead of the trustees therein named, all of whom are now deceased.

Wherefore, your petitioners pray that an appropriate order may be made by this court appointing the said F. X. T. and J. A. K. as substitute trustees under the will of the said A. B., deceased, and authorizing and empowering them to execute and discharge the now unexecuted portion of the trust created in and by said will.

Dated,, 192..

FORM No. 247.

Order Appointing Substitute Trustees.

At a Special Term of the Supreme Court, held at the
Chambers at the Court House, in the City of,
N. Y., on the day of, 192..

Present: Hon., Justice.

In the matter of the estate of A. B.,
Deceased.

Upon reading and filing the petition herein, duly verified by all the persons interested in the estate of A. B., deceased, praying for the appointment of F. X. T. and J. A. K. as substitute trustees under the last will and testament of A. B., deceased, in place of J. A. K., H. J. K. and F. O. B., all of whom are now dead, and on motion of E. A. Pattison, Esq., attorney for the petitioners, herein.

Ordered, That F. X. T. and J. A. K. be and they hereby are appointed substitute trustees under the last will and testament of A. B., deceased, upon executing, acknowledging and filing with the clerk of this court a bond in the usual form to the People of the State of New York, in the penalty of dollars, to be approved as to its form, manner of execution and sufficiency of sureties, by a justice of this court.

Enter in Rensselaer County.

.....,
J. S. C.

FORM No. 248.

Intermediate Account of Substituted Trustee.

[§ 253, ¶ 359]

SURROGATE'S COURT, Rensselaer County.

In the matter of the estate of,
Deceased.

To the Surrogate of Rensselaer County:

I,, substituted trustee under the will of, deceased, hereby render the following account of my proceedings as such trustee, down to the 1st day of July, 192..

By decree of this court made October 12, 1903, I was appointed by this court substituted trustee to carry out the unexecuted trusts created in and by the last will and testament of, deceased, and duly qualified as such trustee.

The cestui que trust at the time of my appointment was and still is, one, who has been judicially declared an incompetent person, and, of Springfield, Mass., has been appointed and now is the general guardian of the person and estate of said

The previous trustee was one, who died, and one became the executor of his last will and testament, and pursuant to a decree entered in this court on the day of, 192., judicially settling the account of said, as such testamentary trustee, the said, as such executor, turned over to me, as such substituted trustee, the securities named in Schedule A hereto annexed and made part of this account.

During the term of my trusteeship, I have rendered accounts to the said, guardian, the first of said accounts covering the period ending, 192., and semi-annual accounts having been rendered since that time,—and have also paid to the said guardian the net income of said trust fund, as required by said will, after deducting annually my commission as such trustee.

Copies of said accounts hereto annexed contain a statement of all the receipts on account of and payments from principal; also, of all the receipts from rental during the period of my trusteeship; of the disbursements made by me out of said rental, and of all money paid to said guardian to July 1st, 192..

Schedule B, hereto annexed, contains a statement by periods corresponding to the said accounts, of all the moneys received on account of principal and all moneys disbursed by way of reinvestment, expenses and commissions.

Schedule C, hereto annexed, contains a statement of the present investments of principal.

Schedule D, hereto annexed, contains a brief statement by periods corresponding to said accounts rendered of the receipts from income and disbursements therefrom and distribution thereof.

SUMMARY STATEMENT.

I credit myself with:	
Receipt on account of principal, Schedule B.....	\$67,270 45
I credit myself with:	
Disbursements from and reinvestment of principal.....	66,987 55
	<hr/>
Leaving uninvested principal on hand.....	\$282 90
	<hr/>
I charge myself with:	
Receipts of income, Schedule D.....	\$49,637 36
	<hr/>

I credit myself with:

Disbursements from and distribution of income, Schedule D..... \$49,637 36

The above-named schedules are to be taken as a part of this account.

.....,
Substituted Trustee.

SCHEDULE A.

Original Investments.

73 shares, National State Bank of Troy, stock..... \$14,235 00

.....,
Substituted Trustee.

SCHEDULE B.

Receipts and Disbursements of Principal.

I charge and credit myself as follows:

To July 1, 192..

Received from proceeds of securities..... \$14,500 00

Paid for new securities..... 12,172 50

.....,
Substituted Trustee.

SCHEDULE C.

Present Investments.

July 1, 192.,
.....

SCHEDULE D.

Income Account.

To Jan. 1, 192..

Received from income..... \$3,299 89

Paid accrued interest on securities bought..... \$104 45

Paid expenses. 436 00

Paid commissions. 107 50

Paid, guardian. 2,651 94

.....,
Substituted Trustee.

(Add oath to account.)

FORM No. 249.**Rejection by Widow of Devise or Bequest in Will and Election to Take Dower Right.**

[§ 200, Real Prop. Law, ¶ 311]

SURROGATE'S COURT, Rensselaer County.

In the matter of the estate of	}
Deceased.	

Whereas, in and by the last will and testament of my husband,, late of the Town of Hoosick, in the County of Rensselaer and State of New York, deceased, which was dated the 15th day of June, 1907, and duly probated on the 21st day of February, 192., it was provided that I,, widow of said deceased, was to have, for the term of my natural life, the use, income, rents, issues, and profits of the homestead farm, where myself and husband resided at his decease, and also the life use of all stock, horses, cattle, pigs, hens, farming tools and implements and all household furniture thereon at his decease, the same being in lieu of all dower rights and exemptions provided by law, but upon the following conditions, to wit: That in case my husband's sister,, desired to come and live at said homestead, that I was to provide a home for her during her lifetime, and take care of such sister in sickness and in health, said bequest and devise being made upon the express condition that I was to keep said premises in good order and repair and to keep the buildings and property insured, and to pay all taxes and assessments during my tenancy, and also being required to replace said stock, horses, cattle and implements from time to time, as they died, became aged or worn out;

Now, therefore, I,, widow of, deceased, aforesaid, do hereby and herein reject the aforesaid provision contained in said will, and on the contrary, I do hereby and herein elect to accept instead the dower rights allowed a widow by the Real Property Law of the State of New York, and also the rights and exemptions provided by the Surrogate's Court Act of the State of New York, and I pray the Surrogate of the County of Rensselaer, aforesaid, to accept and file this, my election as aforesaid.

In Witness Whereof, I have hereunto set my hand and seal this day of, 192..

(Add acknowledgment.)

FORM No. 250.**Acceptance by Widow of Provision in Lieu of Dower.**

[§ 200, Real Prop. Law, ¶ 311]

Know all Men by These Presents, That I,, the widow of, late of the City of Troy, County of Rensselaer and State of New York, and the same person mentioned in the will of said deceased which is recorded in the office of the Surrogate of Rensselaer County in Book of Wills

No. 190, page 596, have heretofore accepted and I declare that I do now accept the pecuniary provision made for me in and by the said will, to wit: An annuity of four thousand dollars (\$4,000) payable in half yearly payments of two thousand dollars (\$2,000) each for and during the whole of my natural life or widowhood in lieu and full satisfaction of all my dower right in the real estate of the said , deceased.

Witness my hand and seal , 192..

.....[L. S.]

(Add acknowledgment.)

FORM No. 251.

Petition for Judicial Settlement of Account of Guardian.

[§ 261, ¶ 378]

SURROGATE'S COURT, County of New York.

In the matter of the judicial settlement of the
account of proceedings of ,
guardian of , infant.

To the Surrogate's Court of the County of New York:

The petition of residing at respectfully states:

That letters of guardianship upon the estate of , infant, the age of fourteen years, were granted to your petitioner.. on the day of , 19.. , by this Court.

That the said infant.. on the day of , 19.. , attained the age of years.

That the names and post-office addresses of the said infant.. , and the sure.... on the official bond of your petitioner.. and of all other necessary and proper parties, are as follows:

Name.	Nature of Interest.	Post-Office Address.
.....
.....
.....

That there are no other persons than those above-mentioned interested in this proceeding.

That your petitioner.... desirous of rendering an account of all h.. proceed- ings as such guardian to the Surrogate's Court of this County, and of having the same judicially settled, and of being discharged.

Wherefore, Your petitioner pray that a citation issue to the above-named person.. to show cause why account as such guardian should not be judicially settled and why should not be discharged.

.....,

Dated, , 19..

(Add verification.)

Petitioner.

FORM No. 252.**Account of Guardian.**

[§ 261, ¶ 378]

SURROGATE'S COURT, County of New York.

(Title.)

To the Surrogates' Court of the County of New York:

I,, residing at street, in the County of New York, do hereby render the following account of my proceedings as general guardian of, infant.

On the day of, 19.., letters of guardianship on the estate of said infant were granted to me by this court. On the day of, 19.., I caused to be filed in the office of the Surrogate of this county, a true and full inventory and account of each article or item of personal property belonging to said infant., pursuant to sections 190 and 191 of the Surrogate's Court Act; and annually thereafter, to wit, on the

I caused to be filed in the office of said Surrogate annual inventories and accounts of the personal property of said infant., as prescribed by the sections above specified; the last of which said inventories and accounts was so filed on the day of, 19.., and the value of the personal property of said infant then remaining in my hands amounted to the sum of \$.....

Schedule "A" hereto annexed contains a statement of all property belonging to my ward.. which came into my hands upon assuming the office of general guardian.

Schedule "B" hereto annexed contains a statement of all property which has come into my hands since said day of, 19.., together with a statement of all debts due said ward.. collected by me, and also of all moneys and interest received by me for which I am legally accountable.

Schedule "C" hereto annexed contains a statement of all property of said ward.. now remaining in my hands, and a full and true description of the amount and nature of each investment made by me since my appointment.

Schedule "D" hereto annexed contains a statement of all property charged in Schedules "A" and "B" not now remaining in my hands, together with a statement of the manner and purposes of its disposal.

Schedule "E" hereto annexed contains a statement in form of debit and credit of all moneys received and disbursed by me on account of said ward.. since the said day of, 19.., and distinctly states the balance now remaining in my hands.

Schedule "F" hereto annexed contains the name., age and place of residence of the ward.. for whom I have acted as general guardian.

Schedule "G" hereto annexed contains a statement of all other facts affecting my administration as such general guardian.

I charge myself as follows:

With amount of property as per Schedule "A".. \$.....

With amount of increase as per Schedule "B"..

Total. \$.....

I credit myself as follows:

With amount as per Schedule "D"..... \$.....

With amount of disbursements as per Schedule

"E"..

Total. \$.....

Leaving a balance of \$..... to be distributed to said ward., subject to the amount of my commission and expenses of this accounting. The said schedules which are severally signed by me are a part of this account.

.....,

General Guardian of, Infant..

(Insert schedules setting forth the necessary facts as indicated.)

SURROGATE'S COURT, County of New York.

In the matter of the judicial settlement of the
account of proceedings of, gen-
eral guardian of, infant.

COUNTY AND STATE OF NEW YORK, ss.:

I,, the general guardian of, infant., being duly sworn, do depose and say, that the foregoing account and schedules contain to the best of my knowledge and belief a full and true statement of all my receipts and disbursements on account of said ward., and of all money and other personal property of the said ward., which have come into my hands or have been received by any other person by my order or authority or for my use since my appointment; and of the value of all such property, together with a full and true statement and account of the manner in which I have disposed of the same, and of all the property remaining in my hands at the present time, and a full and true description of the amount and nature of each investment made by me since my appointment; and I do not know of any error or omission in the foregoing account and schedule to the prejudice of said ward..

Sworn to before me, this }
day of, 192.. }

.....,
General Guardian.

.....,
.....

NOTE.—This same general form may be used by a guardian other than a general guardian.

FORM No. 253.

Decree Setting Guardian's Account on Waivers.

At chambers of the Surrogates' Court, held in and for the
County of New York, at the Hall of Records, in the
County of New York, on the day of
..... in the year one thousand nine hundred and
.....

Present: Hon., Surrogate.

<p>In the matter of the judicial settlement of the account of proceedings of guardian of, infant.</p>	}
---	---

....., Guardian of, infant.., having heretofore filed a
petition, verified on the day of, 19.., in which application
was made to the Surrogate of the County of New York, for a judicial settlement
of account as such Guardian.., and the following persons in
interest have waived the issuance and service of citation, and consent that a
decree be made settling the account as filed, to wit:
and the said Guardian.. having rendered account under oath, before
the said Surrogate, and the account having been filed, and and
the same matter having been duly adjourned to this day, the said Surrogate,
after having examined the said account, now here finds the state and condition of
the said account to be as stated and set forth in the following summary state-
ment thereof, to wit:

A Summary Statement of the account of proceedings of guardian
of infant.., made by the Surrogate as judicially settled.

The said Guardian chargeable as follows:

To amount as per schedule.....

The said Guardian credited as follows:

With amount as per schedule
Leaving a balance in hands of

And it appearing that the said Guardian.. ha.. fully accounted for all the
money and property of the estate or fund of said infant.. which have come into
..... hands as such Guardian.., and account having been
adjusted by the said Surrogate, and a summary statement of the same having
been made as above and herewith recorded, it is hereby ordered, adjudged and
decreed, that the said account be and the same is hereby judicially settled.

And it is further ordered, adjudged and decreed, that (direct
payment of allowances, etc., and balance to late infant.)

FORM No. 254.**Decree of Judicial Settlement.**

[§ 263, ¶ 381]

(Title.)

(Caption.)

....., general guardian of infant., having heretofore made application to the Surrogate of the City and County of New York, for a judicial settlement of accounts as such general guardian, and a citation having been thereupon issued, pursuant to statute, directed to citing and requiring to show cause at the Surrogate's Court, in the City of New York, on the day of last past, at ten-thirty o'clock in the forenoon of that day, why such account should not be judicially settled, and the said citation having been returned with proof of the due service thereof on and the said general guardian having appeared on the return day of said citation, and the said general guardian having rendered account under oath, before the said Surrogate; and the account having been filed, together with the vouchers in support thereof, and and the same matter having been duly adjourned to this day, the said Surrogate, after having examined the said account and vouchers, now here finds the state and condition of the said account to be as stated and set forth in the following summary statement thereof made by the said Surrogate as settled and adjusted by him, to be recorded with and taken to be a part of the decree in this matter to wit:

A summary statement of the account of proceedings of, general guardian of infant., made by the Surrogate as judicially settled and allowed.

The said general guardian chargeable as follows:

To amount of

That said guardian be credited as follows:

.....
 And it appearing that the said general guardian ha.. fully accounted for all the money and property of the estate of said infant., which have come into hands as such general guardian, and account having been adjusted by the said surrogate, and a summary statement of the same having been made as above and herewith recorded, it is hereby

Ordered, Adjudged and Decreed, that the said account be and the same is hereby judicially settled and allowed as filed and adjusted.

And it is further Ordered, Adjudged and Decreed, that (directions as to payment over of funds or delivery of securities should be inserted).

FORM No. 255.

General Petition for Voluntary Judicial Settlement.

[§ 261, ¶ 378]

SURROGATE'S COURT, Essex County.

In the matter of the judicial settlement of the
account of , as
of the of
Deceased.

To the Surrogate's Court of the County of Essex:

The petition of , residing at , in said County of Essex, respectfully shows:

I. That letters of the estate of , late of in said County of Essex, deceased, were duly granted to your petitioner.. by the Surrogate's Court of Essex County, New York, on the day of , 192..

II. That notice to creditors of said decedent to present claims was duly published by your petitioner.. for six months in the , published at , in said County of Essex, and that the time for presentation of claims as fixed by said notice has expired.

III. That the names and postoffice addresses of all creditors or persons claiming to be creditors of the decedent (except such as by vouchers filed with the account appear to be paid), of the sureties on the official bond of your petitioner.., the widow husband of the decedent, and of all the heirs at law and of all the next of kin of the decedent, and of all devisees and trustees under the will of decedent, and of all legatees (except such as by releases duly executed and filed appear to have been fully paid), are as follows:

Name	Nature of Interest	Postoffice Address
.....
.....
.....
.....

IV. That there are no other persons than those mentioned in paragraph III interested in this proceeding, or who are required to be cited herein.

V. That all of the persons mentioned in Paragraph III are of full age and sound mind, except , who is an infant over under the age of fourteen years, and who resides with , at , and

VI. That the estate herein amounts to more less than five thousand dollars.

VII. That your petitioner desirous of rendering to said Surrogate's Court an account of proceedings.

Wherefore, your petitioner.. pray.. that account be judicially settled, and that the parties named in Paragraph III be cited to show cause why such settlement should not be had; and that an order be made directing that service of such citation upon each of said persons as is hereinbefore stated to be a non-resident of the State be made personally without the State, or by publication, pursuant to the provisions of the Surrogate's Court Act.

Dated,, 192..

(Add verification.)

.....,
Petitioner.

FORM No. 256.

Petition by Executor for Judicial Settlement.

[§ 261, ¶ 378]

SURROGATES' COURT, County of New York.

<p>In the matter of the judicial settlement of the account of proceedings of, execut..... of, Deceased.</p>

Petition

To the Surrogates' Court of the County of New York:

The petition of, residing at, respectfully states:

That letters testamentary under the last will and testament of, deceased, who at the time of h... death was a resident of, were granted to your petitioner... by the Surrogates' Court of New York County, New York, on the day of, 192..

That more than one year (six months) has elapsed since the issuance of said letters testamentary, and that the time for presentation of claim as fixed by a notice duly published, has expired.

That the names and post-office addresses of all creditors or persons claiming to be creditors of the decedent (except such as by vouchers filed with the account appear to have been paid), of the sureties on the official bond of your petitioner.. of the widow husband of the decedent, of all the heirs at law and next of kin of the decedent, of all devisees and trustees under the will of decedent, of all legatees (except such as by vouchers and releases duly executed and filed appear to have been paid), and of all other necessary and proper parties, are as follows:

(In every case where it appears that there is no heir-at-law or next of kin, as the case may be; or that it is not known whether or not there be such; or when all the parties interested are non-resident aliens, the citation shall be issued to the attorney-general of the State [§ 54].)

Name	Nature of Interest	Post-Office Address
.....

(If any persons, or their names, residences and post office addresses be unknown, the petition must substantially set forth the *facts* which show what efforts have been made to ascertain the same and a general description of the parties, showing their connection with the decedent and their interest in the matter [§ 51].)

That there are no other persons than those above mentioned interested in this proceeding.

That all of said above-mentioned persons are of full age and sound mind, except.

(State whether or not the infant has a general or testamentary guardian, whether or not his father, or, if he be dead, his mother, is living, giving the post office addresses of such persons, and the name and post office address of the person with whom such infant resides [§ 51].)

who infant under the age of fourteen years
and

who infant over the age of fourteen years.

(If any person named be an adjudged or an alleged, incompetent, state the facts regarding his incompetency, and the name and post office address of a relative or friend having an interest in his welfare; also the name and post office address of the committee, if any, and the name and post office address of the person or institution having the care or custody of the incompetent [§ 51].)

That the estate herein amounts to more than five thousand dollars.
less

That your petitioner desirous of rendering to said Surrogates' Court of New York County an account of proceedings, and therefore pray that account be judicially settled, and that the persons above mentioned and all necessary and proper persons be cited to show cause why such settlement should not be had and for such other and further relief as the Court may deem just and proper, and that an order be granted according to law directing the service of the citation personally without the State or by publication upon the persons hereinbefore stated to be non-residents of the State or otherwise.

Dated, , 192..

.....,
Petitioner.

(Add verification.)

FORM No. 257.

Petition by Executor for Judicial Settlement.

(No nonresidents.)

[§ 261, ¶ 378]

SURROGATES' COURT, County of

In the matter of the judicial settlement of the account of proceedings of as of, <div style="text-align: right;">Deceased.</div>	}
---	---

To the Surrogates' Court of the County of

The petition of, residing at, respectfully sheweth that letters testamentary under the last will and testament of, late of the City of New York, deceased, were granted by this court to your petitioner on the day of, 19..; that the only persons interested in the estate of said decedent as creditors, or persons claiming to be creditors, or as next of kin, legatees or otherwise, together with their places of residence, are, to the best of your petitioner's knowledge, information and belief, as follows, to wit:

..... a of deceased, who resides at

That no bonds were given or required.

That all of the above are of full age and sound mind, except.....

That more than one year has elapsed since the issuance of said letters testamentary.

That there are no other persons than those mentioned interested in this proceeding.

Your petitioner therefore prays that account may be judicially settled and that the persons above mentioned may be cited to show cause why the same should not be judicially settled and allowed.

Dated, New York,, 191...

.....,

Petitioner.

(Add verification.)

FORM No. 258.

Account of Proceedings.

[§ 261, ¶ 378]

SURROGATES' COURT.

In the matter of the judicial settlement of the accounts of of the of,	} Deceased.

To the Surrogates' Court of the County of Rensselaer:

I,, of the of, do render the following account of proceedings as of, deceased:

On the day of, A. D. 19..., letters were issued to; on the day of, A. D. 19..., caused an inventory of the personal estate of the deceased to be filed in this court, which personal estate therein set forth amounts, by appraisement by the appraisers duly appointed, to \$.....

A notice to creditors to present claims has been duly published and the time for such presentation expired on the day of, 19..., proof of which is hereto annexed.

Proceedings to assess a transfer tax have been duly had and the tax so assessed has been paid and receipt therefor filed.

Schedule A hereto annexed contains a statement of all the property contained in said inventory sold by at public or private sale, with the prices and manner of sale, which sales were fairly made by at the best prices that could then be had, with due diligence, as then believed; it also contains a statement of all the debts due the said estate and mentioned in said inventory, which have been collected, and also of all interest for money received by for which legally accountable.

Schedule B hereto annexed contains a statement of all debts in said inventory mentioned not collected or collectible by, together with the reasons why the same have not been collected, and are not collectible; and also a statement of the articles of personal property mentioned in said inventory unsold, and the reasons of the same being unsold, and their appraised value; and also a statement of all property mentioned therein lost by accident without any wilful default or negligence, the cause of its loss, and its appraised value. No other assets than those in said inventory, or herein set forth, have come to possession or knowledge, and all the increase or decrease in the value of any assets of said deceased is allowed or charged in said Schedules A and B.

Schedule C hereto annexed contains a statement of all moneys paid by for funeral and other necessary expenses for said estate, together with the reasons and objects of such expenditures.

Schedule D hereto annexed contains a statement of all the claims of creditors presented to and allowed by or disputed by and for which a judgment or decree has been rendered against, together with the names of the claimants, the general nature of the claim, its amount, and the time of the rendition of the judgment; it also contains a statement of all moneys paid by to the creditors of the deceased, and their names and the times of such payment.

Schedule E hereto annexed contains a statement of all moneys paid the legatees, widow, husband, or next of kin of the deceased.

Schedule F hereto annexed contains the names of all persons entitled as widow, husband, legatees, or next of kin of deceased, to a share of h... estate, with their places of residence, degree of relationship, and a statement of which of them are minors, and whether they have any general guardian, and if so, their names and places of residence, to the best of h... knowledge, information and belief.

Schedule G hereto annexed contains a statement of all other facts affecting administration of said estate rights and those of others interested therein.

..... charge self as follows:

With amount of inventory \$.....

With amount of increase as shown by Schedule A.....

..... credit self as follows:

With amount of loss on sales, as per schedule..... \$.....

With amount of debts not collected, as per do.....

With amount Schedule C.....

With amount Schedule D.....

With amount Schedule E.....

Leaving a balance of

to be distributed to those entitled thereto, subject to the deductions of the amount of commissions, and the expenses of this accounting. The said schedules, which are severally signed by are part of this account.

(Here insert the appropriate schedules, giving the information mentioned above.)

STATE OF NEW YORK, }
County of Rensselaer, } ss.:

....., being duly sworn, says that ..h.. the, etc., of late of the of, in said county, deceased, and that the annexed account is in all respects just and true; that the same, according to the best of ..h.. knowledge and belief, contains a full and true statement of all ..h.. receipts and disbursements on account of the estate of decedent (or on account of the said fund), and of all money and other property belonging to the estate (or fund), which ha... come to ..h.. hands, or which have been received by any other person by ..h.. order or authority for ..h.. use, and that ..h.. does not know of any error or omis-

sion in the account to the prejudice of any creditor of, or person interested in the estate of the decedent (or in said fund).

Th..... deponent.. further say., that all the payments charged in the said account, for which no vouchers or other evidences of payment are here-to annexed or for which ..h.. may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by ..h.. as charged.

Sworn to before me this }
day of, 192.. }

FORM No. 259.

Sample Treatment of Schedules.

SCHEDULE A.

Property Sold.		Increase.
Certificate No. 249, 4.8 shares of the capital stock of the National Bank of Castleton, N. Y., issued to Susan L. Blackman. (Said Bank was in course of liquidation at the time said inventory as made and 111% had been paid to said testatrix thereon in her lifetime.)		
1906.		
July	30. Received for same in full settlement.....	\$24 72
	Value of same in inventory, "Doubtful".....	.....
	Increase over inventory.....	\$24 72
1906.		
July	30. Received of Jennie Potter, residuary legatee, for one dozen silver teaspoons.....	\$6 00
	(Add other items.)	
	Total received for same (see Schedules E. & G.).	\$135 25
	Value of same in inventory.....	135 25
	Increase over inventory.....	.....
Sept.	29. One-half of six acres of rye (received one-half of rye money).....	\$43 09

Oct.	5. Received one-half of straw money.....	37 27	
	Total received for same.....	\$80 36	
	Value of same in inventory.....	18 00	
	Increase over inventory.....		62 36
	(Add other items.)		
Nov.	20. Received for milk and eggs.....	\$27 82	
	(Add other items.)		
	Total received for same.....	\$27 82	
	Not in inventory.....		
	Increase over inventory.....		27 82

Debts Collected and Interest Received.

1907.

Jan.	1. Received of Albany City Savings Institution, interest from Jan. 1, 1906, to Jan. 2, 1907...	\$40 21	
	Not in inventory, none of said interest having been due at death of testatrix, March 22, 1906.		
	Increase over inventory.....		\$40 21
	(Add other items.)		
	Mortgage—Egbert Garrison and wife to Zachariah Z. Smith, dated March 19, 1889, recorded same day in Book 202 of Mortgages, page 396.		

1906.

July	6. Received for same in full.....	\$241 87	
	Value of same in inventory.....	225 00	
	Increase over inventory.....		16 87
	(Add other items.)		
	Note.—Charles J. Reynolds and George W. Witbeck to Zachariah Z. Smith, dated Dec. 7, 1892, for \$20.00 with use.		

1906.

Nov.	8. Received for same in full.....	\$28 48	
	Value of same in inventory, "Doubtful".....		
	Increase over inventory.....		28 48

1907.				
Jan.	1. Received of Albany Trust Co., interest.....	\$8 20		
	Not in inventory; mistake over inventory.....		8 20	
	Total increase over inventory.....		\$208 76	

SCHEDULE A.

Article	Appraised	Sold	Increase	Decrease
	Value	For		
Single barrel shot gun.....	\$3 00	\$3 00	....	....
Revolver and cartridges.....	1 00	40	....	\$0 60
Box of gun shells.....	40	10	....	30
Pair of iron gray horses.....	250 00	200 00	....	50 00
One-horse cutter.....	15 00	15 00	....	....
Top buggy, pole and shafts.....	20 00	18 00	....	2 00
2 plush lap robes.....	2 00	2 00	....	....
1 top cover.....	50	25	....	25
1 plush lap robe.....	1 00	1 50	\$0 50	....
Set of single harness.....	12 50	10 00	....	2 50
<hr/>				
Total.				

SCHEDULE A.

The following is a statement of all the debts due the estate and mentioned in inventory which have been paid to us. No interest was received upon any of such claims.

Name	Amount	Increase	Decrease
	Received		
M. B. Dolan.....	\$8 00	.....	.....
Morris Abeloff.	3 00	.....	\$3 00
Albert Benjamin (Adelbert).....	10 00	\$5 00	.....

SCHEDULE B.—GOODS UNSOLD.

Statement of all the goods in the general inventory, which are unsold, the reasons why such goods were not sold, and appraised value thereof.

Articles	Appraised	Reasons for Not Selling
	Value	
Cherry cobbler.	\$1 50	Delivered to minor child.
1 set of World's Best Literature (30 volumes).....	22 50	Delivered to minor child.
1 set of Cyclopedia Britannica (25 volumes).....	25 00	Delivered to minor child.
	<hr/>	
	\$49 00	
,	
,	
	Administrators.	

LESS COMPLICATED TREATMENT OF SCHEDULES.

I therefore charge myself as follows:

With amount of inventory.....	\$2,875 93
With amount on deposit in Manufacturers' Bank and omitted from inventory.	275 00
With amount of principal paid on Bott mortgage April 1, 1908.....	100 00
With amount of interest on Bott mortgage April 1, 1908.....	40 00
To cash on deposit in National City Bank and omitted from inventory.	199 42
Accrued interest in Troy Savings Bank from October 1, 1907, to October 1, 1908.....	25 01
Accrued interest in National City Bank from January 1, 1908, to January 1, 1909.....	44 11
	<hr/>
	\$3,559 47
	<hr/>

I credit myself as follows:

1908.

Jan. 15. Paid Chas. H. Mason for funeral expenses.....	\$128 50
Jan. 21. Paid State and county taxes for 1907.....	13 07
Jan. 24. Paid Almon Bonesteel bill for drawing coal and potatoes..	5 00
Jan. 25. Paid John Bennett for digging grave.....	4 00
Jan. 25. Paid for work done for deceased.....	5 00
Jan. 25. Paid Rev. Mr. Coombs for service at funeral.....	5 00
Jan. 25. Paid Charles Safford for marker at grave.....	20 00
Jan. 25. Paid Dr. T. L. St. John services for deceased.....	2 00
Jan. 25. Paid clerk of Surrogate's Court for three certificates.....	1 50
Jan. 25. Paid expenses to Troy, three times.....	6 00
Jan. 25. Paid Olin Magary, appraiser.....	5 00
Jan. 25. Paid Brigham Morrison, appraiser.....	5 00
Jan. 25. Paid C. S. McChesney, legal services and disbursements....	25 14
	<hr/>
	\$225 71
	<hr/>

Recapitulation.

Total receipts.	\$3,559 45
Total disbursements.	225 71
	<hr/>
Balance on hand.	\$3,333 74
	<hr/>

Subject to my commissions and the expenses of this accounting.

The only persons interested in the account are as follows: Eva Magary, daughter of said deceased; Blanche R. Lane, daughter of said deceased; Wilhelmina G. Rockenstyre, daughter of Earl Rockenstyre, deceased son of said

deceased; Daphna Ketchum and Henry D. Cipperly, sureties on official bond of administrator.

All of full age and sound mind, except the said Wilhelmina G. Rockenstyre, who is an infant under 14 years of age, who resides at Brunswick, N. Y., with her aunt, Eva Magary, your petitioner, who is also the duly appointed guardian of her person and estate.

EVA MAGARY,
Administratrix.

SAMPLE TREATMENT OF SCHEDULES.

Account of Executor.

Follow the usual account to the schedules, and the following may be used as suggestions for such schedules:

SCHEDULE "A."

Containing a statement of all interest money received by me.

May 1, 1909, received from savings bank in payment of interest upon deposits.	\$109 03
---	----------

SCHEDULE "B."

Containing a statement of articles and personal property mentioned in inventory, unsold.

Certain items of watches, etc., inventoried at \$51.50, have been accepted by Mary Smith, residuary legatee, in lieu of money....	\$51 50
---	---------

SCHEDULE "C."

Containing a statement of all moneys paid by me for funeral and other necessary expenses of said estate, together with reasons and objects of such expenditures.

July 5, 1908, Charles P. Bragle, undertaker.....	\$204 50
July 17, 1908, Albany Cemetery Association, digging grave.....	5 00
July 5, 1908, Benjamin W. Knower, services as attorney on probate of will.....	50 00
July 5, 1908, Benjamin W. Knower, services as attorney in the matter of order of publication and inventory.....	25 00
July 5, 1908, Messrs. John H. McMahon and Chas. W. Marchall, fees as appraisers.....	20 00
July 5, 1908, amount paid serving citation on Mary Smith.....	1 00
July 5, 1908, incidental disbursements.....	1 00
November 30, 1908, Benjamin W. Knower, services as attorney in the matter of the transfer tax proceeding.....	25 00
July 17, 1908, expressage.....	2 00

July 22, 1908, Troy Times, publishing notice to creditors.....	13 25
May 1, 1909, Flint Granite Co., for marker.....	40 00
November 30, 1908, Comptroller of the State of New York, inheritance tax.	87 50
May 1, 1909, Benjamin W. Knowler, general consultation, advice and services as attorney in the matter of accounting.....	100 00
Total.	<u>\$574 25</u>

JAMES A. CULLEN.

SCHEDULE "D."

Containing a statement of all claims of creditors presented to and paid by me.

February 27, 1909, Roselthia Craft, unpaid board bill.....	<u>\$12 00</u>
--	----------------

SCHEDULE "E."

Containing a statement of all moneys paid legatees and next of kin to the decedent.

July 5, 1908, Mary Smith.....	\$31 50
February 17, 1909, Mary Smith.....	100 00
May 5, 1909, Frank Craft (less inheritance tax).....	380 00
Elmira Reeves (less inheritance tax).....	380 00
Elmer Winters (less inheritance tax).....	190 00
Henry Winters (less inheritance tax).....	48 50
Permelia Winters (less inheritance tax).....	95 00
Ira Clute (less inheritance tax).....	95 00
Hannah Barringer (less inheritance tax).....	190 00
Elizabeth Barringer (less inheritance tax).....	95 00
Martha Little (less inheritance tax).....	190 00
Total.	<u>\$1,910 00</u>

JAMES A. CULLEN.

SCHEDULE "F."

Containing a statement of all persons entitled as legatees or as next of kin to deceased to share in his estate.

Mary F. Smith, daughter of decedent, over 21 years of age, is entitled to the residue of the estate after the payment of debts and legacies mentioned in above schedules.

JAMES A. CULLEN.

FORM No. 260.

Statement of Claim by Estate to Disputed Assets.

[§ 209, ¶ 420]

SCHEDULE "G."

Where the representative claims the ownership of a disputed bank deposit, the statement may be in the following form as used in Matter of Duffy, 127 App. Div. 74:

"In addition to the foregoing conceded assets there is the following: On deposit in the Dime Savings Bank of Brooklyn to the credit of Bank Book No. 195755, \$2,000.00, and accrued interest on the same to date. This bank book is entitled 'Dime Savings Bank in account with Louisa Moran in Trust for Mary F. Moran.' The estate of decedent claims the ownership of this book and the moneys represented thereby. One Josephine McDermott also claims to be the owner of the same by virtue of an alleged gift causa mortis. The bank book is now in possession of said Josephine McDermott, but the claims of the respective parties to the same have not yet been finally adjudged."

FORM No. 261.

Account of Executor or Administrator.

In the matter of the judicial settlement of the account of proceedings of, Deceased.	}
--	---

To the Surrogates' Court of the County of New York:
....., of the County of New York, do render the following account of proceedings as of, deceased: On the day of, 19..., letters were issued to On the day of, 19... caused an inventory of the personal estate of the deceased to be filed in this office, which personal estate therein set forth amounts, by appraisement by the appraisers duly appointed, to \$.....

Schedule A, hereto annexed, contains a statement of all the property contained in said inventory, sold by at public or private sale, with the prices and manner of sale; which sales were fairly made by at the best prices that could then be had, with due diligence, as then believed; it also contains a statement of all the debts due the said estate and mentioned in said inventory, which have been collected, and also of all interest or moneys received by for which legally accountable.

Schedule B, hereo annexed, contains a statement of all debts in said inventory mentioned, not collected or collectible by together with the

reasons why the same have not been collected and are not collectible; and also a statement of the articles of personal property mentioned in said inventory unsold, and the reasons of the same being unsold, and their appraised value; and also a statement of all property mentioned therein lost by accident, without any wilful default or negligence, the cause of its loss and appraised value. No other assets than those in said inventory, or herein set forth, have come to possession or knowledge, and all the increase or decrease in the value of any assets of said deceased is allowed or charged in said Schedules A and B.

Schedule C, hereto annexed, contains a statement of all moneys paid by for funeral and other necessary expenses for said estate, together with the reasons and object of such expenditure.

On or about the day of in the year 19..., caused a notice for claimants to present their claims against the said estate to within the period fixed by law, and at a certain place therein specified to be published in two newspapers, according to law, for six months, pursuant to an order of the surrogate of the County of New York; to which order, notice and due proof of publication herewith filed refer as part of this account.

Schedule D, hereto annexed, contains a statement of all the claims of creditors, presented to and allowed by or disputed by and for which judgment or decree has been rendered against together with the names of the claimants, the general nature of the claim, its amount, and the time of the rendition of the judgment; it also contains a statement of all moneys paid by to the creditors of the deceased, and their names, and the time of such payment.

Schedule E, hereto annexed, contains a statement of all moneys paid to the legatees, widow, or next of kin of the deceased.

Schedule F, hereto annexed, contains the names of all persons entitled as husband, widow, legatee, or next of kin of the deceased, to a share of estate or fund, with their post-office addresses, degree of relationship, and a statement of which of them are minors and whether they have any father, mother or guardian, and if so, their names and post-office addresses to the best of knowledge, information and belief.

Schedule G, hereto annexed, contains a statement of all other facts affecting administration of said estate or fund rights and those of others interested therein.

..... charge as follows:
 With amount as shown by Schedule A..... \$.....
 credit as follows:
 With amount of loss on sales, as per Schedule B..... \$.....
 With amount of debts not collected, as per do.....
 With amount of Schedule C.....
 With amount of Schedule D.....
 With amount of Schedule E.....

Leaving a balance of.....
to be distributed to those entitled thereto, subject to the deductions of the
amount of commissions, and the expenses of this accounting.
The said Schedules, which are severally signed by are part of this
account.

In the matter of the judicial settlement of the
account of proceedings of,
Deceased.

County of New York, ss..

..... as of, deceased; being
duly sworn, say that the charges made in the foregoing account of proceedings
and schedules annexed, for moneys paid by to creditors, legatees
and next of kin, and for necessary expenses, are correct, that
have been charged therein all the interest for moneys received by
and embraced in said account, for which a legally
accountable; that the moneys stated in said accounts as collected were all that
were collectible, according to the best of knowledge, information and
belief; that the allowances in said decrease in value of any assets, and charges
therein, for the increase in such value, are correctly made; and that
do not know of any error in said account or anything omitted therefrom which
may in anywise prejudice the rights of any party interested in said estate or
fund; and that said account contains, to the best of knowledge
and belief, a full and true statement of all receipts and dis-
bursements on account of said estate or fund, and of all money and other
property belonging to said estate or fund which have come into
hands, or which have been received by any other person for or
by or by order or authority for use, and that
do not know of any error or omission in the account to the prejudice
of any creditor of or person interested in said estate or fund.

Sworn before me, this }
day of, 19.. }

FORM No. 262.**Waiver of Citation for Judicial Settlement and Consent to Settlement of Account.**

[§ 41, ¶ 20]

SURROGATE'S COURT, County of

In the matter of the judicial settlement of the
 account of the proceedings of
 as of
 Deceased.

We, the undersigned, of, late of the Town
 of, in said County of, deceased, do, by these pres-
 ents, waive the issue and service of citation in the above-entitled proceeding,
 and hereby consent that the account of the proceedings of, as
 of the said, deceased, which was filed in the office
 of the Surrogate of said County of on the day of
, 191..., may be judicially settled, and that a decree may be
 entered in the above-entitled proceeding judicially settling such account without
 further or other notice to us, or either of us; we do hereby appear in such
 proceeding and authorize our appearance to be entered on the record.

Sealed with our seals and dated this day of, 19...

..... [L. S.]
 [L. S.]
 [L. S.]
 [L. S.]

(Add acknowledgment.)

FORM No. 263.**Waiver of Citation.**

SURROGATES' COURT, County of New York.

In the matter of the judicial settlement of the
 account of the proceedings of
 as of
 Deceased.

To the Surrogates' Court of the County of New York:

..... the undersigned being person.. interested as
 in the estate or fund of do hereby waive the issue and
 service of a citation in the above-entitled matter, and consent that a decree be
 made settling the account of said

Dated
, 192.. }

(Add acknowledgment.)

FORM No. 264.

Citation for Judicial Settlement—Executor.

[§ 262, ¶¶378]

THE PEOPLE OF THE STATE OF NEW YORK

By the Grace of God, Free and Independent

To and to all persons interested as creditors, legatees, next of kin or otherwise, in the Estate of, deceased,, who at the time of h... death was a resident of the send greeting:

Upon the petition of residing at

You and each of you are hereby cited to show cause before the Surrogate's Court of New York County, held at the Hall of Records, in the County of New York, on the day of, 192.., at half-past ten o'clock in the forenoon of that day, why the account of proceedings of as execut..... of the last will and testament of said deceased, should not be judicially settled.

In Testimony Whereof, We have caused the Seal of the Surrogate's Court [L.S.] of the said County of New York to be hereunto affixed.

Witness, Honorable, a Surrogate of our said County, at the County of New York, the day of, in the year of our Lord one thousand nine hundred and

.....
Clerk of the Surrogate's Court.

FORM No. 265.

Decree of Judicial Executor's Accounts on Waivers.

At chambers of the Surrogates' Court, held in and for the County of New York, at the Hall of Records, in the County of New York, on the day of, in the year one thousand nine hundred and

Present: Honorable, Surrogate.

In the matter of the judicial settlement of the account of proceedings of execut..... of the last will and testament of, deceased.

....., execut..... of the last will and testament of deceased, who at the time of h... death was a resident of having heretofore filed a petition, verified the day of

19..., in which application was made to the Surrogate of the County of New York, for a judicial settlement of account of such execut..... and the following persons in interest have waived the issuance and service of citation, and consent that a decree be made settling the account as filed, to wit:

.....
and the said execut..... having rendered account under oath, before the said surrogate; and the said account having been filed, and.....
.....and the said matter having been duly adjourned to this day, the said surrogate, after having examined the said account, now here finds the state and condition of the said account to be as stated and set forth in the following summary thereof, to wit:

A Summary Statement of the account of, execut..... of the last will and testament of, deceased, made by the surrogate as judicially settled

The said execut..... chargeable as follows:

With amount as per schedule A.

The said execut..... credited as follows:

With amount as per schedule

Leaving a balance in hands of

And it appearing that the said execut..... ha..... fully accounted for all the moneys and property of the estate or fund of said deceased, which have come into hands as such execut..... and account having been adjusted by the said surrogate, and a summary statement of the same having been made as above and herewith recorded, it is hereby ordered, adjudged and decreed, that the said account be and the same is hereby judicially settled.

And it is further ordered, adjudged and decreed, that out of the balance so found, as above, remaining in the hands of the said execut..... retain the sum of dollars and cents (\$.....) for the commissions to which ..he entitled on this accounting; and that retain the sum of dollars and cents (\$.....) for costs, and disbursements on this accounting.

And it is further ordered, adjudged and decreed, that

(Directions regarding payment of balance.)

FORM No. 266.

Decree Settling Executor's Accounts After Citation.

At chambers of the Surrogates' Court, held in and for the
County of New York, at the Hall of Records, in the
County of New York, on the day of,
in the year one thousand nine hundred and

Present: Hon., Surrogate.

In the matter of the judicial settlement of the
account of proceedings of,
execut..... of the last will and
testament of, deceased.

..... Exec.... of the Last Will and Testament of de-
ceased, who at the time of h.. death was a resident of
having heretofore filed a petition, verified the day of, 19..,
in which application was made to the Surrogate of the County of New York,
for a judicial settlement of account of such Execut.... and a cita-
tation having been thereupon issued, pursuant to statute, directed to all persons
interested in the estate or fund of said deceased, citing them to show cause be-
fore the said Surrogate, at his office in the County of New York, on the
day of, 19.., at ten thirty o'clock in the forenoon of that day,
why the account of said Execut.... should not be judicially settled, and the
said citation having been returne with proof of the due service thereof on
.....
and the said Execut.... having appeared on the return day of said citation
.....
and the said Execut.... having rendered account under oath, before
the said Surrogate; and the said account having been filed, and
and the said matter having been duly adjourned to this day, the said Surro-
gate, after having examined the said account, now here finds the state and con-
dition of the said account to be as stated and set forth in the following summary
statement thereof, to wit:.....

(Continue as in Form No. 265.)

FORM No. 267.

Affidavit of Regularity.

SURROGATE'S COURT, County of New York.

In the matter of the estate of
Deceased.

COUNTY OF NEW YORK, ss.:

....., being duly sworn, says that he is the attorney of the herein. That all the parties to this proceeding have been duly cited or have duly waived the issuance and service of a citation, approved the accounts filed herein and consented to the entry of a decree approving and settling the same, in the manner and form following, to-wit:

I. By service of a copy of the citation issued herein upon the following persons, in the manner prescribed by sections 55 and 60 of the Surrogate's Court Act, as more fully appears by the proof of service thereof, made in the manner and form prescribed by law, and filed herein on the day of, 19.., viz.: On

Name.	When.	Where.
.....
.....
.....

II. By service thereof without the State, or by publication in pursuance of an order made herein on the day of, 19.., under sections 56 and 59 of the Surrogate's Court Act, as more fully appears by the proof of service thereof, made in the manner prescribed by law and filed herein on the day of, 19.., viz.: On

Name.	When.	Where.
.....
.....
.....

III. Personally or by attorney by duly executed waivers of the issuance and service thereof, containing an approval of the account filed herein and a consent to the entry of a decree approving and settling the same, and filed herein on the day of, 19.., by

IV. That no notice of appearance has been filed herein, except by

That all of the persons named above are of full age and sound mind, except-

ing those hereinbefore stated to be otherwise, and comprise all the parties, as deponent verily believes, who have any interest in this proceeding.

Sworn to before me this }
day of, 192.. }

NOTE.—Where a person cited is an infant, a lunatic, an habitual drunkard, or for any cause mentally incapable adequately to protect his rights, it must so appear in the foregoing affidavit. The age of the infant must also be stated.

FORM No. 268.

Order for Service by Publication.

At a Surrogate's Court, held in and for the County of Erie,
State of New York, at the Surrogate's office in the City
of Buffalo, in said County, on the day of,
A. D., 192..

Present: Hon., Surrogate.

In the matter of the judicial settlement of the
accounts of of
Deceased.

A citation having been issued in the above-entitled proceeding, returnable in this court on the day of, 192.., at ten o'clock in the forenoon; and it appearing to the satisfaction of the Surrogate by the verified petition of

That the following named persons to be served with said citation are not residents of the State of New York, viz.:

And that there are persons required to be made parties to this proceeding who are unknown, or whose names or places of residence are unknown, and cannot, after diligent inquiry, be ascertained, viz.:

On motion of attorney.. for the petitioner.. herein.

It is ordered that the service of said citation on the said persons hereinbefore mentioned be made by the publication of said citation in newspaper.. hereby designed, viz.: published in said County of Erie, State of New York, once a week for four successive weeks, or at the option of the petitioner.. by delivering a copy of said citation without the State to each of said persons personally in the manner prescribed in section 59 Surrogate Court Act.

And it is further ordered that on or before the day of the first publication of said citation, the said petitioner deposit in the post-office at the City of Buffalo, in said County of Erie, a copy of the said citation, contained in a securely closed, postpaid wrapper, directed to the said persons to be served with said citation respectively at the places hereby specified, viz.

And it appearing from the said petition, that are infants under the age of fourteen years, and sojourning with, it is further ordered that on or before the day of the first publication of said citation, the said petitioner deposit the copy of the said citation contained in a securely closed, postpaid wrapper, directed to the following named persons at the places hereby specified and set opposite their names, viz.:

And the Surrogate, being satisfied by the affidavit upon which this order is granted, that the petitioner cannot with reasonable diligence ascertain a place or places where persons to be served as aforesaid would probably receive matter transmitted through the post-office; hereby dispenses with the deposit of any paper therein for them.

.....,
Surrogate.

FORM No. 269.

Order Consolidating Accounting and Judicial Settlement.

[§ 65, ¶ 365]

(Title.)

(Caption.)

Application having been heretofore made by the petition of, praying that, as of the of, deceased, be required to render and settle his account, and upon the return day of the citation issued thereon the said, having appeared and filed his petition and account and taken a citation for a voluntary judicial settlement thereof, and said citation having been returned with due proof of service thereof, and it appearing that this is a proper case for the consolidation of such proceedings, it is hereby ordered that the proceedings aforesaid be and they hereby are consolidated upon the following terms and conditions, namely: (Insert any allowance to the parties or other conditions of consolidation.)

.....,
Surrogate.

FORM No. 270.

Order of Reference of Account.

[§ 66, ¶ 15]

(Title.)

(Caption.)

The said having filed account, and objections thereto having been also filed by,

It is Ordered, that it be referred to, Esq., Counselor at Law, of the City of New York, to inquire into the necessary jurisdictional facts, to examine said account and objections, to hear and determine all questions arising upon the settlement of said account which the Surrogate has power to determine, and to make report to the court with all convenient speed.

FORM No. 271.

Petition by Administrator for Judicial Settlement.

[§ 262, ¶ 378]

SURROGATE'S COURT, County of New York.

In the matter of the judicial settlement of the
account of proceedings of
as administra..... of
Deceased.

Petition.

To the Surrogate's Court of the County of New York:

The petition of, residing at, respectfully states:
That letters of administration upon the goods, chattels and credits of
....., deceased, who at the time of his death was a resident of,
were granted to your petitioner.. by the Surrogate's Court of New York County,
New York, on the day of, 19..

That more than

one year
six months

 has elapsed since the issuance of said letters of
administration and that the time for presentation of claims as fixed by a notice
duly published has expired.

That the names and post-office addresses of all creditors or persons claiming
to be creditors of the decedent (except such as by vouchers filed with the account
appear to have been paid), of the sureties on the official bond of your peti-
tioner.., of the

widow
husband

 of the decedent, of all the next of kin of the decedent,
and of all other necessary and proper parties, are as follows:
.....

(In every case where it appears that there is no heir at law or next to kin, as
the case may be; or that it is not known whether or not there be such; or when
all the parties interested are non-resident aliens, the citation shall be issued to
the attorney-general of the State [§ 54].)

Name.	Nature of Interest.	Post-Office Address.
.....
.....

(If any persons, or their names, residences and post office addresses be un-
known, the petition must substantially set forth the *facts* which show what
efforts have been made to ascertain the same and a general description of the
parties, showing their connection with the decedent and their interest in the
matter [§ 51].)

That there are no other persons than those above-mentioned interested in
this proceeding, and that all of said above-mentioned persons are of sound mind;
and all of full age, except who infant.. over

(State whether or not the infant has a general or testamentary guardian,
whether or not his father, or, if he be dead his mother, is living, giving the

post office addresses of such persons, and the name and post office address of the person with whom such infant resides [§ 51].)

the age of fourteen years,

and who infant.. under the age of fourteen years,

(If any person named be an adjudged, or an alleged, incompetent, state the facts regarding his incompetency, and the name and post office address of a relative or friend having an interest in his welfare; also the name and post office address of the committee, if any, and the name and post office address of the person or institution having the care or custody of the incompetent [§ 51].)

That the estate herein amounts to ^{more}_{less} than five thousand dollars.

That your petitioner desirous of rendering to said Surrogate's Court of New York County an account of proceedings, and therefore pray that account be judicially settled, and that the persons above-mentioned and all necessary and proper persons be cited to show cause why such settlement should not be had and for such other and further relief as the court may deem just and proper, and that an order be granted according to law directing the service of the citation personally without the State or by Publication upon the persons hereinbefore stated to be non-residents of the State or otherwise.

Date,, 19..

.....,

Petitioner.

(Add verification.)

FORM No. 272.

Petition of Administrator for Judicial Settlement.

KINGS COUNTY SURROGATE'S COURT.

In the matter of the petition of
to render and settle account
as administrator of,
Deceased.

To the Surrogate's Court of the County of Kings:

The petition of, who reside at, respectfully shows:

That letters of administration on the goods, chattels and credits of lately residing at, in the Borough of Brooklyn, City of New York, County of Kings, deceased, were granted by this court to your petition.. on the day of, 192.., and that more than has expired since the issuance of said letters, and that a notice requiring all persons

having claims against said deceased to exhibit the same, with the vouchers thereof, to petitioner.. on or before the day of, 192.., has been duly published according to law.

That so far as can be ascertained with due diligence, the names and post-office addresses of all persons interested in this proceeding who are required to be cited, or concerning whom the court is required to have information, are as follows: (Insert names, residences, whether minors or incompetents).

That all the above are of full age and of sound mind, except

That there are no other persons than those above-mentioned interested in this proceeding.

Your petitioner.. therefore prays that account may be judicially settled, and that the persons above-named may be cited to show cause why such settlement should not be had.

Dated the day of, 192..

.....,
Petitioner.

(Add verification.)

FORM No. 273.

Citation for Judicial Settlement—Administration.

[§ 252, ¶ 378]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God, Free and Independent.

To, and to all persons interested as creditors, next of kin or otherwise, in the estate of, deceased, who at the time of h.. death was a resident of, send Greeting:

Upon the petition of, residing at

You and each of you are hereby cited to show cause before the Surrogate's Court of New York County, held at the Hall of Records, in the County of New York, on the day of, 19.., at half-past ten o'clock in the forenoon of that day, why the account of proceedings of as administrat... of the goods, chattels and credits of said deceased, should not be judicially settled.

In Testimony Whereof, We have caused the seal of the Surrogate's Court of the said County of New York to be hereunto affixed.

Witness, Honorable, a Surrogate of our said County,
[L.S.] at the County of New York, the day of, in the year of our Lord one thousand nine hundred and

.....,
Clerk of the Surrogate's Court.

FORM No. 274.

Decree of Judicial Settlement.

At chambers of the Surrogate's Court, held in and for the
County of New York, at the Hall of Records, in the
County of New York, on the day of,
in the year one thousand nine hundred and

Present: Honorable, Surrogate.

In the matter of the judicial settlement of the
account of proceedings of
as administrat..... of
Deceased.

....., administrat.... of the of, deceased,
who at the time of h.. death was a resident of, having heretofore
filed a petition, verified on the day of, 19.., in which appli-
cation was made to the Surrogate of the County of New York, for a judicial
settlement of account of such administrat.... and a citation
having been thereupon issued, pursuant to statute directed to all persons in-
terested in the estate or fund of said deceased, citing them to show cause before
the said Surrogate, at his office in the County of New York, on the day
of, 19.., at ten thirty o'clock in the forenoon of that day, why
the account of said administrat.... should not be judicially settled, and the
said citation having been returned with proof of the due service thereof on
..... (or, and all the following named persons in interest having waived
the issue and service of citation and consented that a decree be made settling
the account as filed, to-wit:) and the said administrat.... having
appeared on the return day of said citation and the said administrat.... having
rendered account under oath, before the said Surrogate; and the said
account having been filed, and and the said matter having been
duly adjourned to this day, the said Surrogate, after having examined the said
account, now here finds the state and condition of the said account to be as
stated and set forth in the following summary statement thereof, to-wit:

A summary statement of the account of, administrat.... of
the of, deceased, made by the Surrogate as judicially
settled.

The said administrat.... chargeable as follows:

With amount as per schedule dollars.

The said administrat.... credited as follows:

With amount as per schedule dollars.

Leaving a balance in hands of

And it appearing that the said administrat.... ha.. fully accounted for all
the moneys and property of the estate of said deceased, which have come into

..... hands as such administrat.... and account having been adjusted by the said Surrogate, and a summary statement of the same having been made as above and herewith recorded, it is hereby ordered, adjudged and decreed, that the said account be and the same is hereby judicially settled.

And it is further ordered, adjudged and decreed, that out of the balance so found, as above, remaining in the hands of the administrat.... retain the sum of dollars and cents (\$.....) for the commission to which he entitled on this accounting, and that retain the sum of dollars and cents (\$.....) for costs and disbursements on this accounting.

And it is further ordered, adjudged and decreed, that (insert allowances and directions for distribution).

FORM No. 275.

Objections to Account.

SURROGATE'S COURT, County of

In the matter of the judicial settlement of the
accounts of as
etc.

The undersigned, a person interested in the estate of, late of the of, N. Y., hereby makes and files objections to the account of the of said heretofore filed in this court as follows:

I. Objects to the item in said account in Schedule C thereof by which the said assumes to take credit for the payment of \$..... to for his services and disbursements as undertaker; and this objection is made upon the ground that the said payment is an excessive and extravagant amount to be paid for the funeral of said deceased and is out of proportion to the proper expenditures for such a purpose in accordance with the position in life and circumstances of the deceased.

II. Objects to the item in said account in Schedule C thereof whereby the said assumes to take credit for the payment of \$..... to for legal services in connection with the administration of the estate and this objection is made upon the ground that the alleged payment has not been made and upon the further ground that it is excessive in amount and is an unreasonable charge for legal services and counsel fees necessarily incurred in the administration of said estate.

III. Objects to the item in said account in Schedule C thereof whereby the said assumes to take credit for the payment of the sum of \$..... to in compromise of an action brought against the said and this objection is made upon the ground that the same was improperly and unlawfully and collusively paid if paid at all. And upon

the ground that the said had no just cause of action against said estate, but only a pretended cause of action and that the said settlement was negligently and collusively made (insert any other objection which there may be to the account).

Dated, ,
Contestant.
Post-Office Address,
.....

(Add verification.)

FORM No. 276.

Decree on Judicial Settlement.

[§ 267, ¶ 440]

(Title.)

(Caption.)

..... of the of, late of the of, deceased, having heretofore and on the day of, 192.., duly presented and filed account of proceedings duly verified, together with the vouchers in support thereof, and having also on said day duly presented petition in writing praying for a final judicial settlement of accounts as such and a citation having been thereupon duly issued to all persons interested in the estate of said deceased requiring them to show cause in this court on the day of, 19... , why said account should not be judicially settled and allowed, and said citation having been returned with proof of the due service thereof according to law, and said having appeared, in person and by; and it appearing that minor.. upon filing his written consent thereto, was duly appointed the special guardian of said minor.., to attend to ..h.. interest in this matter, and ..h.. appeared personally for that purpose; and no objections having been made to the said account (and the will of said deceased having been read in evidence from the records of this court), and said account and the vouchers therewith filed, having been duly examined and found correct, and the transfer tax assessed having been duly paid and a voucher therefor duly filed, the said Surrogate proceeded to settle the same and decree and order concerning the same as hereinafter, and in the summary statement hereto annexed appears, which statement, forms part of this decree and is to be recorded herewith. It is therefore ordered, adjudged and decreed that said be charged in said account as follows:

Amount of inventory \$.....
Amount of increase \$.....

Total \$.....

That he be credited as follows:

Amount of debts paid	\$.....
Amount of funeral and administration expenses.....	.....
Amount of legacies paid (in case of will).....	.....
Amount of distributive shares advanced.....	.....
<hr/>	
Total.	\$.....
<hr/>	
Leaving balance on hand of.....	\$.....
<hr/>	

That there be allowed and paid from such balance as follows:

Commissions to	\$.....
Disbursements and attorney fees to.....	.....
Compensation to special guardian.....	.....
Costs to . . . . .	.....
<hr/>	
Total.	\$.....
<hr/>	

That the balance amounting to \$..... be paid out as provided by the will (or the interstate law) as follows:

To	\$.....
To	\$.....
<hr/>	

The said having accounted for all the property and estate of said deceased that has come into hands as such, it is further ordered, adjudged and decreed that said account be and the same hereby is judicially settled and allowed as filed and adjusted; and that upon ..he.. filing in this court the receipts of the above-named persons for the respective amounts hereby decreed to be paid to them and each of them, said be and ..he.. hereby discharged from any further liability in this matter as to all things determined by this decree.

Witness, Hon., Surrogate, and the seal of the court, etc.

SUMMARY STATEMENT.

The following is a summary statement of the accounts settled and allowed, made and recorded, pursuant to the statute in such case made and provided, that is to say:

The said charged with the amount of the inventory	\$.....
Increase . . . . .	.....
<hr/>	
Total	\$.....

The said credited by amount of funeral expenses,
 and expenses of administration and debts of said deceased paid. \$.....
 By legacies or distributive shares paid.....
 Shall retain for commissions.....
 Allowance to special guardian.....
 Shall be allowed for expenses of accounting.....

And the balance of \$..... shall pay out and distribute as provided by
 the foregoing decree.

FORM No. 277.

Special Directions Which May be Inserted in a Decree as Occasion Requires.

[§ 268, ¶ 473]

It further appearing from the consent of the parties entitled to receive pay-
 ment as above set forth, filed in this court, that they have consented to the
 distribution of the following described property in kind, namely:
 at the agreed (or appraised) value as follows:

It is Ordered, that said instead of converting said property into
 money and making payment as above directed, transfer and deliver said prop-
 erty in accordance with the terms and conditions of said consent, and proper
 receipts therefor shall be a discharge of this decree to the extent of the values
 thereof as so agreed or fixed.

Property to be Retained.

[§ 269, ¶ 474]

And it appearing that an admitted debt owing by the decedent is not yet
 due, and the creditor will not accept present payment thereof; or

That a claim against said deceased filed by of the amount of
 \$..... is rejected and an action is pending and undetermined for the
 recovery thereof; or

That a controversy exists over the right of a beneficiary to share in the
 trust fund, which is the subject of this accounting, and such right has not been
 determined;

It is Ordered, that (follow § 269).

Share of Infant.

[§ 271, ¶ 47]

And it appearing that to whom a legacy of \$.....
 (\$50 or less) is given, which has not been paid, is an infant,

It is Ordered, that said legacy of \$..... be paid to for
 the use and benefit of said infant, or

And it appearing that who is entitled to a distributive share amounting to \$..... (\$150 or less) is an infant,

It is Ordered, that said distributive share of \$..... be paid to for the use and benefit of said infant, or

And it appearing that is an infant and that is his guardian, and that such guardian has filed sufficient security for the protection of said infant,

It is Ordered, that the said legacy (or distributive share) be paid to such guardian for the use and benefit of such infant, or

And it appearing that is an infant having no guardian,

It is Ordered, that the legacy (or distributive share) directed herein to be paid to said infant, be paid into the Surrogate's Court by depositing the same with the county treasurer of this county.

FORM No. 278.

Bill of Costs and Affidavit.

[§§ 278, 279, ¶¶ 153, 156]

SURROGATE'S COURT, County of New York.

In the matter of the judicial settlement of the
account of,

Deceased.

[No endorsement of this

Bill of Costs required.]

NOTE.—See Sections 278 and 279 of the Sur. Court Act, and Rule 22 of this Court.

COSTS.			DISBURSEMENTS.		
Costs pursuant to Section 278 of the Sur. Ct. A.....	\$		For Serving Citation on parties....	\$	
Contest.....			" Publication Citation, New York Law Journal.....		
No contest.....			" Publication Citation.....		
Days occupied in the trial or hearing, less one, and less adjournments.....			" Referee's Fees.....		
Motions for New Trial.....			" Appraiser's Fees.....		
Allowance to accounting party under Section 279 of the Sur. Ct. A., viz.:			" Stenographer's Fees.....		
Days occupied in trial or hearing, less adjournment.....			" Affidavits and Acknowledgments.....		
Days necessarily occupied in preparing account.....			" Postage.....		
Days necessarily occupied in otherwise preparing for trial.....			" Certified Copies.....		
TOTAL COST AND ALLOWANCE.....	\$		" Certified Copy Decree.....		
DISBURSEMENTS.....	\$		" Satisfaction of Decree.....		
TOTAL.....	\$		" Certificate of Filing Satisfaction.....		
			" necessary copies of Papers, as follows:		
			" Attendance of Witnesses.....		
				\$	

STATE OF NEW YORK, }
 County of New York, } ss.:

....., being duly sworn, says that he is, the attorney and counsel for in the above-entitled proceeding; that the foregoing disbursements have been actually made or will be necessarily incurred therein, by or in behalf of the said That such disbursements are correctly stated, and are for reasonable and necessary expenses in this proceeding.

Deponent further says that the time stated in the foregoing bill of costs as having been occupied as therein specified was actually, substantially and necessarily so occupied and employed in this matter by deponent, and that the time occupied on each day in the rendition of the services aforesaid, and their nature and extent in detail, are, as hereafter set forth, opposite the date of the rendition of the services and under the appropriate head of particular class of services rendered in the above-entitled proceeding.

That no compensation has been paid or given out of the funds of the estate of the said deceased for or on account of the services specified herein.

(Jurat.)

FORM No. 279.

Resignation of Executor and Trustee.

SURROGATE'S COURT, Rensselaer County.

In the matter of the estate of....., }
 Deceased. }

I,, of the City of Troy, Rensselaer County, New York, executor and trustee named in the will of, deceased, hereby resign both of the aforesaid offices, to-wit, executor and trustee, and request that I be discharged as such and relieved of any further liability and duty on account thereof.

Dated,

.....[L. S.]

(Add acknowledgment.)

FORM No. 280.

Waiver and Consent to Resignation of Trustee, Settlement of Account,
and Appointment of New Trustee.

SURROGATE'S COURT, Rensselaer County.

In re the petition of of the city
of, county of
and state of, as trustee under
the will of for permission to
account and be discharged, and in the matter
of the appointment of a substituted trustee
under the aforesaid will to succeed the said
....., resigned.

I,, as (beneficiary, legatee, etc.) under the will of,
deceased, do by these presents, waive the issue and service of the usual citation
required by law in both above-entitled proceedings, and I do hereby consent that
....., as trustee under the will of, deceased, have a
judicial settlement of his accounts before the Surrogate of Rensselaer County,
whenever offered for that purpose, and be discharged as trustee,

And I do hereby further consent that a trustee to execute the trusts created
by the provisions of the will of the said, deceased, be appointed
by the Surrogate of Rensselaer County to succeed the aforesaid,
without further notice to me, and I do hereby appear in both proceedings and
authorize my appearance to be entered on the record.

Dated, [L. S.]

State of }
County of, } ss.:

On this day of, 19.., personally appeared before me
....., to me well known to be the same person described in and who
executed the foregoing instrument and who acknowledged the execution of the
same for the purposes therein mentioned.

.....,
.....

FORM No. 281.

Petition for Compulsory Accounting.

SURROGATE'S COURT, County of New York.

In the matter of the application for a compulsory accounting in the estate of,	}
Deceased.	

To the Surrogate's Court of the County of New York:

The petition of residing at respectfully states:

That your petitioner of, deceased, who at the time of h.. death was a resident of

That

(The petition must substantially set forth the facts upon which the jurisdiction of the court depends to entertain the application and grant the relief asked for. [Section 51 Sur. Ct. A.])

That letters on the estate of said deceased were on the day of, 19.., granted by the Surrogate of the County of New York to who resides at

That there are no other persons than those above-mentioned interested in this proceeding.

That more than ha.. elapsed since h.. appointment, and the said ha.. not

Your petitioner therefore prays that a citation issue requiring the to show cause why should not render and have judicially settled account of proceedings as such

Dated,, 19..

.....,

Petitioner.

(Add verification.)

FORM No. 282.**Petition to Compel Judicial Settlement.**

[§ 258, ¶ 369]

SURROGATE'S COURT, Albany County.

In the matter of the petition of	}
to compel, as the	
of the of, de-	
ceased, to account and render and file an	
account of proceedings as such	

To the Surrogate's Court of the County of Albany:

The petition of respectfully shows that he resides at No. street, in the; that letters, deceased, were granted to on the day of, 192.., that more than twelve months have elapsed since said appointment (or that more than fifteen days have elapsed since the publication of notice to creditors has expired) and that said ha.. rendered no account of proceedings as such

Your petitioner further shows that he is of the age of years and is interested in the estate of said deceased as and desires that said render and settle account of all proceedings as such, and for that purpose prays that a citation issue to requiring to appear in this court, at a certain day to be therein specified, then and there to show cause why he should not render and settle account of proceedings as such That there is no other person interested in this application.

Dated this day of }
, 192.. }
 (Add verification.)

FORM No. 283.**Consent to Accept Payment of Legacy or Distributive Share in Kind.**

[§ 268, ¶ 473]

(Title.)

I,, a legatee (next of kin) of the above-named deceased, consent to accept in lieu of money, the value thereof to be fixed by appraisement.

We the undersigned being all of the persons interested, hereby waive an appraisement of the above described property and consent that the value thereof is \$.....

Dated,, 192..

(Title.)

We the undersigned being all the parties interested in the distribution of the estate of the above-named deceased, do hereby consent to accept in lieu of money, the value thereof being hereby fixed as follows:

Dated,, 192..

FORM No. 284.**Order of Reference of Account.**

[§ 257]

At a Surrogate's Court held in and for the County of New York, at the Hall of Records in the County of New York, on the day of, in the year one thousand nine hundred and

Present: Hon., Surrogate.

_____ of

Deceased.

The said having filed an intermediate account pursuant to an order made the day of, 192.., and objections thereto having been filed by

It is Ordered, That it be referred to, Esq., counselor-at-law of the City of New York, to inquire into and examine said account and objections, and to take evidence in respect thereto, and report the same, together with a summary statement of the account, with all convenient speed.

FORM No. 285.**Release of Distributive Share.**

SURROGATE'S COURT, Rensselaer County.

In the matter of the estate of....., }
 Deceased. }

\$.

....., the undersigned of, late of the
 of, N. Y., deceased, do hereby certify that,
 as administrator.. of the goods, chattels and credits of said deceased, h..
 fully and satisfactorily accounted to me as such administrator.. of said de-
 ceased, for all the goods, chattels and credits of said deceased, held by
 as such administrator..

Now, Therefore, in consideration of the money and property heretofore re-
 ceived by me and the sum of dollars, this day to me in hand paid,
 the receipt whereof is hereby acknowledged, I do hereby release the said
 and the sureties on official bond, from any and all
 liability to me as such administrator.. And I do hereby waive the issue and
 service of a citation to attend any final or intermediate judicial settlement of
 the accounts of such administrator.., and do hereby voluntarily appear in any
 proceeding instituted or to be instituted for such judicial settlement and au-
 thorize my personal appearance to be entered on the record.

Witness my hand and seal this day of, 192..

.....[L. S.]

.....[L. S.]

(Add acknowledgment.)

FORM No. 286.**Release of Legacy.**

SURROGATE'S COURT, Rensselaer County.

In the matter of, late of }
, }
 Deceased. }

\$.

I,, of, County of and State of
, do hereby certify that I have received this day of,
 19.., of, the executor of the last will and testament of,
 late of the of, Rensselaer County, N. Y., deceased,

the sum of dollars and cents, in full satisfaction of the amount of my legacy given and bequeathed to me under the will of said deceased. And I do hereby waive the issue and service of a citation to attend any final or intermediate judicial settlement of the accounts of such executor, and do hereby voluntarily appear in any proceeding instituted or to be instituted for such judicial settlement and authorize my personal appearance to be entered on the record.

Sealed with my seal and dated this day of, 192..

.....[L. S.]

(Add acknowledgment.)

FORM No. 287.

Release by Infant who has Arrived at Age.

SURROGATE'S COURT, Albany County.

In the matter of the estate of,
late infant.. now of full age.

..... do hereby acknowledge that the guardian of person.. and estate.. has fully and satisfactorily accounted to for all moneys and property held by as such guardian.

Now, therefore, in consideration of the moneys and property heretofore received by and the sum of dollar.. this day to in hand paid, the receipt whereof is hereby acknowledged do hereby release, exonerate and discharge the said as such guardian, and his sureties in that behalf given, and of, from, any and every liability and accountability to and consent that said guardian may have a decree made and entered discharging without a further accounting.

And do hereby waive the issue and service on of a citation to attend the judicial settlement of the accounts of said guardian, or any other proceeding taken by said guardian in the Surrogate's Court of said County of Albany, for the purpose of securing his final release and discharge as such guardian.

Witness hand and seal this day of, 192..

.....[L. S.]

(Add acknowledgment.)

FORM No. 288.

Release and Discharge of Guardian by Agreement.

[§. 251, ¶ 357]

Whereas, on the day of, 191., of was duly appointed guardian of the person and estate of, a minor, by the Surrogate's Court of County and thereupon duly qualified as such guardian and entered upon the performance of the duty of said office.

And Whereas, the said arrived at the age of twenty-one years
on the day of, 192., and

Whereas, said guardian has settled with said ward all matters and things whatsoever relating to the guardianship and to the property and estate of said ward, in which said settlement said guardian is charged:

With amount of personal property and income thereof received.... \$.....

With amount of income from ward's real estate received.....

Total \$

And is credited

With amount expended in care of said ward's estate.... \$.

With amount applied to support, maintenance and educa-
tion of said ward.....

With amount of commissions.....

With amount of expenses.....

Total

Leaving a balance of \$.....

Now, Therefore, in consideration of the payment and delivery unto me, the said of dollars in cash and dollars in property and securities, the receipt whereof is hereby acknowledged, being the aforesaid balance in the hands of said guardian after deducting therefrom the lawful commissions, and also in consideration of a mutual agreement to waive a judicial accounting, I do for myself, my executors and administrators release and forever discharge the said and the sureties upon the official bond of said guardian and from any and every claim, demand, action and cause of action, account, liability or reckoning of every name and nature for and on account of any and every matter and thing whatsoever arising from or in any manner relating to or connected with my estate and said guardianship and together with my said guardian do request the Surrogate of said county to record this instrument as provided by law.

In Witness Whereof, we, the said guardian and ward and said sureties, have hereunto set our hands and seals the day of, one thousand nine hundred and twenty.

.....,
Guardian.
.....,
Late Ward.
.....,
Surety.
.....,
Surety.

Sealed and delivered in presence }
of }
(Add acknowledgments.)

FORM No. 289.

Release and Discharge of Administrator by Agreement.

[§ 251, ¶ 357]

Whereas,, late of, died on or about the day of, 19.., and thereafter on the day of, 19.., letters of administration upon the goods, chattels and credits which were of said deceased, were duly granted unto, who duly qualified as such administrat.. and entered upon the discharge of duties.

And Whereas, the undersigned are all the sureties on the bond of said administrat.. and the undersigned, are all the creditors who have presented claims which remain unpaid against the estate of the said deceased and the undersigned,, are all the persons entitled to a distributive share of the estate;

And Whereas, the said administrat.. ha.. prepared and made account and exhibited the same to the undersigned creditors and persons entitled to a distributive share wherein the said administrat.. charged,
With amount received from all sources..... \$.....

And credited
With expense of administration and funeral expenses.... \$.....
With payment of debts of decedent.....
With commissions

Leaving a balance in hands of said administrat.. of..... \$.....
applicable to the payment of the unpaid debts of said decedent and for distribution amongst the next of kin.

And Whereas, the undersigned have settled with said administrat.. all matters and things whatsoever relating to said estate and to all claims and

interest therein; and have received the amount of their respective claims and distributive shares so far as there were sufficient assets to pay the same; the receipt whereof we hereby severally acknowledge, and in consideration of a mutual agreement to waive a judicial accounting, we, the undersigned sureties, creditors and persons entitled to distributive shares, do, and each of us acting individually and without regard to the execution of these presents by the others does, hereby remise, release and forever discharge the said administrat.. and the sureties upon the official bond of such administrat.. of and from any and every claim, demand, action and cause of action, account, reckoning and liability' of every name and nature for and on account of any and every matter and thing whatsoever arising from or in any manner relating to or connected with the estate of said deceased or with the administration thereof; and we and the said administrat.. who also subscribe.. these presents, severally request the Surrogate of said county to record this instrument as required by law.

In Witness Whereof, we have hereunto set our hands and seals this day of, in the year one thousand nine hundred and twenty.

In presence of
(Add acknowledgments.)

FORM No. 290.

Release and Discharge of Executor by Agreement.

[§ 251, ¶ 357]

Whereas,, late of, heretofore died on or about the day of, 19.., leaving a last will and testament in which he appointed of execut.. thereof.

And Whereas, the said last will and testament of the said deceased was thereafter on the day of, 192.., duly admitted to probate by the Surrogate's Court of the County of Westchester and letters testamentary were duly issued to said execut..

And Whereas, the undersigned,, are all the creditors who have presented claims which remain unpaid against the estate of the said deceased, and the undersigned, are all the legatees under said will;

And Whereas, the said execut.. ha.. prepared and made ..h.. account and exhibited the same to the undersigned creditors and legatees wherein the said execut.. charged`

With amount received from all sources..... \$.....
And credited
With expense of administration and funeral expenses.... \$.....
With payment of debts of decedent.....
With amount of commissions.....

Leaving a balance in the hands of said execut.. of..... \$.
 applicable to the payment of the unpaid debts of said decedent and the legacies
 bequeathed in and by h.. last will and testament.

And Whereas, the undersigned have settled with said execut.. all matters
 and things whatsoever relating to said estate and to all claims and interest
 therein;

Now, Therefore, in consideration of the payment to us of our respective
 proportionate shares of our several claims and legacies, the receipt whereof
 we hereby severally acknowledge, and also in consideration of a mutual agree-
 ment to waive a judicial accounting, we the undersigned do, and each of us
 acting individually and without regard to the execution of these presents by the
 others does, hereby remise, release and forever discharge the said
 execut.. of and from any and every claim, demand, action and cause of action,
 account, reckoning and liability of every name and nature for and on account
 of any and every matter and thing whatsoever arising from or in any manner
 relating to or connected with the estate of said deceased or with the adminis-
 tration thereof; and we and the said execut..; who also subscribe these presents,
 severally request the Surrogate of said county to record this instrument as
 required by law.

In Witness Whereof, we have hereunto set our hands and seals this
 day of, in the year one thousand nine hundred and
 twenty.

In presence of
 (Add acknowledgments.)

FORM No. 291.

Agreement Settling Account of Trustee.

[§ 251, ¶ 357]

SURROGATE'S COURT, Rensselaer County.

In the matter of the settlement of the accounts
 of as trustee under the will of
, Deceased,

It appearing from the will of, deceased, that a certain sum of
 money, to wit, two hundred dollars, was left in trust to pay the income thereof
 to during her life, and at her decease to pay the principal thereof
 to her heirs-at-law and next of kin,

And it also appearing by a provision of said will that a discretionary power
 was conferred upon the trustee to pay principal, or any part thereof, to the
 said,

And it appearing that of said trust fund there now remains the sum of
 \$102.55 principal, and certain accrued interest,

And that (who was appointed trustee by an order of this court, dated March 9, 192..), owing to ill health is not able to act in that capacity any longer,

And it being evident that the expenses of an accounting and appointment of a new trustee, would practically use up the estate,

Now, therefore, in consideration of the foregoing and of the sum of five dollars, I,, as trustee as aforesaid, do hereby acknowledge the receipt of all claims for fees and expenses as trustee under the aforesaid will, and we,, residuary legatees under the will of, deceased, in consideration of the sum of \$1 and for other good and valuable considerations, the receipt whereof is hereby acknowledged, do hereby consent to the payment to of the sum of \$102.55, with such interest as may have accrued, less \$5 in lieu of commissions and expenses of the trustee aforesaid, and \$10 for legal expenses, leaving to be paid the sum of \$87.55 with the accrued interest as stated above.

And I,, beneficiary as aforesaid, do hereby acknowledge the receipt of the aforesaid sum of \$87.55, with all accrued interest due or to become due thereon.

Therefore, in consideration of the facts aforesaid, we,, beneficiary, and, residuary legatees, do hereby release and forever discharge individually and as trustee under the will of, deceased, his successors and legal representatives, and the sureties on his official bond, to wit, the estate of and, from the payment of all principal and income, legacies, claims and demands whatsoever, which we now have or may have against the aforesaid estate and trustee thereof, his successors and legal representatives as beneficiary, legatees or otherwise, under the aforesaid will.

And we do hereby specifically acknowledge the full satisfaction and receipt of all principal, income, legacies, claims and demands whatsoever, due or to become due, by virtue of the trust herein referred to, and admit full settlement of the accounts of as trustee under the will of, deceased, and request that this be recorded in the Surrogate's Court of Rensselaer County as evidence thereof.

In Witness Whereof, we have hereunto set our hands and seals the day of November, 192..

.....[L. S.]
As Trustee Under the Will of Cynthia Lewis, Deceased.
.....[L. S.]
.....[L. S.]
.....[L. S.]

(Add acknowledgments.)

FORM No. 292.

Transcript of Decree.

Title of decree.	Amount decreed to be paid.
SURROGATE'S COURT, Monroe County.	
<div>In the matter of the of, Deceased.</div>	
Names of parties against whom decree has been made and entered.	Names of parties in whose favor decree has been made and entered.
.....
.....
.....
Time of filing, entering and recording of decree.	When decree was discharged.
.....
.....
.....
Name of attorney	
STATE OF NEW YORK,	} ss.:
Monroe County,	
Surrogate's Office,	
I,, Clerk of the Surrogate's Court of the County of Monroe, and State of New York, do hereby certify that the foregoing is a correct transcript from the records kept in my office of a decree for the payment of money made by the Surrogate's Court of the said County of Monroe.	
In Witness Whereof, I have hereunto set my name, and affixed the seal of said Surrogate's Court, this day of, A. D., 192..	
	..... Clerk of the Surrogate's Court.

FORM No. 293.

Satisfaction of Decree.

[§ 82, ¶ 33]

SURROGATE'S COURT, Warren County.

<div>In the matter of the judicial settlement of the estate of Deceased.</div>
--

\$.....
This is to certify, that I,, the subscriber, one of the of, late of the Town of, in said County of Warren,

deceased, have received of and from, the of the estate of said decedent, the sum of dollars, in full satisfaction and payment of the amount directed to be paid to me by the decree in this matter, made and entered on the day of, 192.., and I authorize and direct the Surrogate of Warren County to discharge and satisfy said decree of record as to all my claims and demands thereunder.

Witness my hand and seal the day of, 192..

..... [L. S.]

(Add acknowledgments.)

SURROGATE'S COURT, Erie County.

In the matter of the judicial settlement of the
accounts of of
Deceased.

A decree having been made by the Surrogate's Court of Erie County, in the above-entitled proceeding on the day of, 192.., directing that as of the of late of the of New York, deceased, pay to as one of the of said deceased, the sum of dollars. Now, I to whom said money was directed to be paid by said decree, do hereby acknowledge full satisfaction of said decree and the receipt of said sum from said and release from all claims therefor, and hereby authorize and request the surrogate of said county to make and enter an order without further notice to me satisfying and cancelling said decree.

Dated this day of, 192..

(Add acknowledgment.)

FORM No. 294.

Petition for Order to Withdraw Legacy or Share Paid Into Court.

SURROGATE'S COURT, Rensselaer County.

In the matter of the judicial settlement of the
accounts of, as executors of
the last will and testament of
Deceased.

To the Surrogate's Court of Rensselaer County:

The petition of residing at Jefferson, Marion County, in the State of Oregon, respectfully shows to the court:

That heretofore and on the day of, 192.., a decree was

entered in the Surrogate's Court of the County of Rensselaer in the matter of the judicial settlement of the estate of the aforesaid, deceased, in which among other things it was adjudged that the legacy of two hundred dollars bequeathed in the will of said deceased to one, also known as, should be paid and deposited with interest from, 19..., with the county treasurer of the County of Rensselaer, subject to the further order of this court.

That in pursuance of said decree the executors of the estate of said deceased,, did on the day of, 19..., pay to the county treasurer of Rensselaer County the sum of \$222.82 the share of the said, deceased. That it appears by the certificate and receipt of the said county treasurer hereto annexed that the amount now on deposit with the accrued interest for the use and benefit of said is the sum of \$306.16.

That said Addie A. Parrish departed this life on the day of, 19..., at Jefferson, in the County of Marion, State of Oregon, and that on the day of, 19..., letters of administration upon the estate of said deceased were duly issued to your petitioner by the Probate Division of the County Court for Marion County in the State of Oregon.

That on, 19..., ancillary letters of administration were issued and granted to your petitioner by the Surrogate's Court of the County of Rensselaer upon the estate of said, and your petitioner is now duly acting administrator both in the State of Oregon and in the State of New York of the estate of said, deceased.

That the purpose for which your petitioner was appointed ancillary administrator of the estate of said in the State of New York was to withdraw from the treasury of the County of Rensselaer the sum of money decreed to be paid to the county treasurer of said county to the credit of said by said decree of, 19...

That no other persons than those herein mentioned are interested in this application.

Wherefore, your petitioner prays that an order be made herein directing the county treasurer of the County of Rensselaer to pay said sum of \$306.16 with all accumulations of interest thereon to your petitioner after deducting his legal fee for the payment of the same. And your petitioner will ever pray.

.....,
Petitioner.

(Verification.)

FORM No. 295.

Order to Withdraw Legacy or Share Paid Into Court.

At a Surrogate's Court held at the Court House in the
City of Troy, in the County of Rensselaer, State of
New York on the day of, 192..

Present: Hon., Surrogate.
SURROGATE'S COURT, Rensselaer County.

In the matter of the judicial settlement of the
accounts of, as executors of
the last will and testament of,
Deceased.

On reading and filing the petition of, verified the day
of, 19..., and the certificate of the county treasurer of the county
of Rensselaer, dated, 19..., whereby it appears that in accord-
ance with a decree of this court the executors of the said, de-
ceased, on the day of, 19..., paid to the county treasurer the
sum of \$222.82 to the credit of, also known as,
and it appearing that the amount on deposit to the credit of,
also known as with the said county treasurer with the accrued
interest is now the sum of \$306.16 with interest since, 19..., to
be added, and it also appearing that said is now deceased and
that the said has been duly appointed administrator of the estate
of said in the State of Washington and ancillary letters of
administration on said estate having been issued to the said by
this court;

Now on motion of, attorney for said petitioner, it is
Ordered, that the said county treasurer of Rensselaer County pay to said
..... the said sum of \$306.16 now in his hands and interest accrued
since, 19..., being the share and accrued interest of said
..... in the above-entitled proceeding less his commission for payment of
the same.

.....,
Surrogate.

FORM No. 296.

Petition for Order to Transfer Real Property Contracted to be Sold.

[§ 203, ¶ 206]

SURROGATE'S COURT, Broome County.

In the matter of the estate of.....,	}
Deceased.	

To the Surrogate of the County of Broome:

The petition of, as executor of the last will and testament of, late of the Town of Union, Broome County, N. Y., deceased, respectfully shows:

First, that, died on the day of, 19..., at the Town of Union aforesaid, and was at the time of his death a resident of said county. That at the time of his death he was seized of the legal title to the lands hereinafter described, subject to the contract to convey hereinafter mentioned.

Second, that said died leaving a last will and testament and leaving a widow,, and a daughter,, an infant under the age of fourteen years, as his sole heir-at-law and next of kin. That in and by said last will and testament he gave, devised and bequeathed one-third of all his property to said widow, and the remaining two-thirds to said daughter. That said widow and said daughter are the owners and seized in fee simple of said premises subject to the contract to convey hereinafter mentioned. That said widow and said daughter now reside together at the Village of Sidney Centre, Delaware County, N. Y.

Third, that said last will and testament was duly admitted to probate in the Broome County Surrogate's Court on the day of, 192..., and letters testamentary were issued to your petitioner on the same day, who is now acting in the discharge of his duties as executor of said estate, and who resides at the village of Unadilla, Otsego County, N. Y.

Fourth, that previous to his death, and on the day of, 19..., said and, his wife, by a contract in writing, duly acknowledged, promised and agreed to convey to one, and one, his wife, certain real property situated in the Town of Fenton, Broome County, N. Y., a copy of which contract, together with certain payments made thereon, is hereto attached, marked Exhibit "A," and made a part of the moving papers herein. That as your petitioner is informed and believes, thereafter and on the day of, 19..., said and, his wife, duly assigned all their right, title and interest in and to said contract to one, who is now owner and holder thereof, a copy of which assignment is hereto attached, marked Exhibit "B," and made a part of the moving papers herein.

Fifth, that on the day of, 19.., said, duly served a notice upon your petitioner, requesting and making demand that proceedings be instituted under the provisions of section 203 of the Surrogate's Court Act, for the conveyance to said of all right, title and interest of said, deceased, in and to said premises, a copy of which notice is hereto attached, marked Exhibit "C," and made a part of the moving papers herein.

Sixth, that as petitioner is informed and believes, there is unpaid and owing on said contract the sum of \$1,000, principal, with interest from the day of, 19.., as alleged in said notice.

That no other persons than those mentioned are interested in this application.

Wherefore, your petitioner prays that a citation be issued to said widow and heir-at-law and next of kin, requiring them to show cause why an order should not be granted authorizing said conveyance, pursuant to the provisions of section 203 of the Surrogate's Court Act.

Dated, Unadilla, N. Y.,, 19..

(Verification.)

(Exhibits.)

NOTE.—A similar petition may be made reciting the facts, and that a conveyance has been made, and asking that the persons interested show cause why the conveyance should not be confirmed.

FORM No. 297.

Order to Convey.

At a Surrogate's Court held in and for the County of Broome, N. Y., at the Court House in the City of Binghamton, on the day of, 19..

Present: Hon., Surrogate.

SURROGATE'S COURT, Broome County.

In the matter of the application of,	}
as executor of the last will and testament	
of,	
Deceased,	
for authority to convey real property of the deceased.	

..... as executor of the last will and testament of, late of the Town of Union, in the County of Broome, N. Y., deceased, having heretofore, and on the day of, 19.., duly presented to the Surrogate's Court of the County of Broome a verified petition praying for an order authorizing and directing said executor to execute a deed of certain lands,

which said decedent in his lifetime, with his wife, contracted to sell and convey to and, his wife, said conveyance to be made by said executor to, the assignee of the interest of said in said contract, pursuant to section 203 of the Surrogate's Court Act, the fee to which was vested in said decedent in his lifetime and which said property is hereinafter more particularly described; and the said Surrogate having been duly satisfied that a proper case was made and duly presented, under said section 203 of the Surrogate's Court Act, and having thereupon caused a citation to be issued out of this court, directed to all the persons interested in the estate of said decedent, requiring them to show cause why the prayer of the petition should not be granted in said Surrogate's Court, at the Court House in the City of Binghamton on the aforesaid .. day of, 19.., at 10 o'clock in the forenoon; and the said citation having been returned on that day, and filed with due proof of service thereof on each of the persons therein named;

And the said petitioner having appeared in person and with, his attorney;

And, Esq., having duly filed, according to law, a consent to act as special guardian of, the sole heir-at-law and next of kin of said decedent, said being an infant under the age of fourteen years, and the Surrogate having granted an order duly appointing said, Esq., as said special guardian for the purposes of this proceeding;

And the proper proceedings in due form of law, having been thereupon had, and the Surrogate having proceeded to hear the application and proofs of the parties, and the facts having been established to the satisfaction of the Surrogate that the contract mentioned and described in said petition is valid, and in force, and that said, the vendor, had not in his lifetime effectually conveyed his interest in said lands in fulfillment thereof, and was at the time of his death seized in fee simple of said lands, subject to said contract; and the fact having been established to the satisfaction of the Surrogate that the said and, his wife, had duly sold, assigned and set over to all their right, title and interest in and to said contract, and that said is now the owner and holder thereof; and it having been also established to the satisfaction of the Surrogate that there is due on said contract the sum of \$1,000, with interest from the day of, 19.., at the rate of 5 per cent. per annum;

Now, on motion of, attorney for said executor and petitioner,

It is Ordered, Adjudged and Decreed, pursuant to section 203 of the Surrogate's Court Act, that said, as executor aforesaid, upon receiving the balance of the purchase price, to wit, \$1,000, with interest from the day of, 19.., at the rate of 5 per cent. per annum, execute and deliver to, the assignee of the vendee's interest in and to the said premises, a deed of said premises, which are described as follows:

All that tract or parcel of land, etc.

Said premises are subject to a mortgage of \$2,500, given by to

....., upon which there is due \$2,500 of principal, which said mortgage and any interest due and to grow due thereon since, 19.., is to be assumed by said, as a part of the purchase price herein, and which she is to assume and pay.

It is further Ordered, that said executor pay from said fund the sum of \$...... to, for attorney and counsel fees and expenses in this proceeding, and the further sum of \$...... to, Esq., for his services as special guardian herein. That said executor retain the balance of said funds in his hands, to be distributed by him upon the final judicial settlement of said estate.

NOTE.—Order may confirm conveyance where that is the prayer of the petition.

FORM No. 298.

Deed Pursuant to Order to Convey to Fulfill Contract.

This Indenture, made this day of, 19.., between, residing in, administratrix of the goods, chattels and credits of, late of the Town of Schaghticoke, Rensselaer County, N. Y., deceased, party of the first part, and, residing in the said Town of Schaghticoke, Rensselaer County, N. Y., party of the second part,

Whereas, the said, prior to his death, and on or about the day of, 19.., entered into an agreement, in writing, whereby he agreed to and with the said to sell and convey unto him, his heirs and assigns forever, the premises hereinafter described, the consideration thereof being the payment of five hundred dollars at the time of the execution of the same, and the balance of sixty-six hundred dollars to be paid thereafter; and whereas, the said died on or about the day of, 19.., intestate, without completing the performance of said agreement, and on or about the day of, 19.., letters of administration upon the goods, chattels and credits of the said, deceased, were issued to, party of the first part herein; and whereas, the said, as such administratrix, has presented to the Surrogate's Court of the County of Rensselaer her petition, duly verified and dated the day of, 192.., praying for an order or decree authorizing her to execute and deliver a proper deed or deeds of said real estate to, and thereupon a citation was issued out of said court, returnable on the day of, 192..; and whereas, upon the return of said citation an order of said Surrogate's Court was granted, wherein it was ordered, adjudged and decreed that the said, as administratrix of the goods, chattels and credits of, deceased, was authorized and empowered, upon the receipt by her of the sum of sixty-six hundred dollars, to execute and deliver a proper deed or deeds of the said real estate to, conveying all the right, title

and interest of the said at the time of his death in and to said premises.

Now, Know Ye, that by virtue of the authority and license aforesaid, and in order to fulfill and perform all things in the above-mentioned contract or agreement on the part of the said to be performed, and to carry out the directions and requirements of the above-named order, and in consideration of the said sum of sixty-six hundred dollars to me paid by the said, the receipt whereof is hereby acknowledged, and in consideration that the said has performed and fulfilled all things in the above-recited contract or agreement, on his part to be performed and fulfilled, I, the said, administratrix of the goods, chattels and credits of, deceased, do hereby grant, bargain and sell to the said, his heirs and assigns forever, all the right, title and interest which the said had at the time of his death in and to all that tract or parcel of land, etc.....

.....
.....

To have and to hold the same to the said, his heirs and assigns, to his and their use forever.

In Witness Whereof, the party of the first part has hereunto set her hand and seal, the day and year first above written.

.....[L. S.]
As administratrix of goods, chattels and credits of
Albert Allen, deceased.

(Add acknowledgment.)

FORM No. 299.

Petition for Leave to File Exemplified Copy of Foreign Will.

[¶ 75, § 44, Dec. Est. L.]

SURROGATE'S COURT, County of New York.

In the matter of filing for record an exemplification of the will of
late of the,
State of,
Deceased.

To the Surrogate's Court of the County of New York:

The petition of, residing at, State of, respectfully sheweth, that your petitioner is of the last will and testament of said deceased.

That said deceased was at the time of death a resident of, State of, and departed this life in, on the day of, 19.., leaving real property or an interest in real property situated within this county, to wit:

..... which is devised by the said will of said deceased.

That said will is in writing, is subscribed by said testator, and was executed without this State in the mode prescribed by law either of the place where executed or of the testator's domicile.

That on the day of, 192.., the said will of said deceased was admitted to probate within the State where the deceased so resided as aforesaid.

That said will is filed or recorded in the the same being the proper office as prescribed by the laws of said State of, and that the said will, with the proofs and the records thereof, remains in said Court.

That your petitioner herewith presents a copy of such will, proofs and records prepared and exemplified as prescribed by sections 44 and 45 of the Decedent Estate Law.

..... That, no previous application herein has been heretofore made to this court.

Your petitioner, therefore, prays that a decree may be signed by the surrogate of this court, directing that said copies be filed and recorded in this office.

Dated, New York City,, 192..

.....,

Petitioner.

STATE OF NEW YORK, }
County of New York, } ss.:

....., the petitioner named in the foregoing petition, being duly sworn, deposes and says that has read the foregoing petition subscribed by and knows the contents thereof, and that the same is true of own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters believes it to be true.

.....,

Petitioner.

Sworn to this day of }
....., A. D., 192.. }

.....,

Notary Public, N. Y. Co.

FORM No. 300.

Order Allowing Recording of Exemplified Copy of Foreign Will.

[¶ 75, § 44, Dec. Est. L.]

At the Surrogate's Court held in and for the County of
Rensselaer, at the Surrogate's Office in the City of
Troy, in said County, on the day of, 192..

Present: Hon., Surrogate.

In the matter of the application for permis-
sion to record the exemplified copy of the
last will and testament of,
late of Bridgeport, Connecticut, deceased,
pursuant to section 44, Decedent Estate Law.

Upon reading and filing the exemplified copy of the last will and testament of, late of the City of Bridgeport, in the State of Connecticut, deceased, and the decree of the Probate Court for the District of Bridgeport, in the State of Connecticut, entered on the day of, 19...., admitting the same to probate and of the letters of administration with the will annexed, issued thereon to, and on the proofs taken on the probate of said will on file in the office of said court, together with the duly verified petition of, said administrator with the will annexed, praying for a decree of this court that said exemplified copy of said will together with the record and proofs thereof be recorded in this court pursuant to section 44 of the Decedent Estate Law, as a will of real property, and the surrogate having ascertained to his satisfaction that there is real property of said deceased situated in the county of Rensselaer in the State of New York, and that said will was duly executed without the State in the mode prescribed by law either of the place where executed or of the testator's domicile.

Now, on motion of Edward K. Nicholson, attorney in person,

It is Ordered and Decreed, that said exemplified copy of said will and of said proofs and other records be recorded and spread upon the records of this court as a will of real property in accordance with and pursuant to section 44 of the Decedent Estate Law.

.....,

Surrogate.

FORM No. 301.

Petition for Direction as to Voluntary Sale of Real Property.

[§ 215, ¶ 225]

SURROGATE'S COURT, Rensselaer County.

In the matter of the application of
as executor of the last will and testament
of, late of the town of East
Greenbush, Rensselaer County, N. Y.,
Deceased,
for the sale of certain real estate.

To the Surrogate's Court of the County of Rensselaer:

The petition of, residing in the City of Watervliet, Albany County, N. Y., respectfully shows:

First.—That your petitioner is the executor named in the last will and testament of, late of the Town of East Greenbush, Rensselaer County, N. Y., deceased, which will was duly admitted to probate in Rensselaer County Surrogate's Court on the 21st day of April, 1914. That your petitioner duly qualified and is now acting as the executor of said will. That said, the wife of testator, who was named as executrix of said will, has never qualified and is not now acting as such executrix.

Second.—That said died on March 20, 1914, and letters testamentary upon said will were duly issued to your petitioner on the 21st day of April, 1914, and said letters testamentary are still in force.

Third.—That no inventory of the personal property of said testator has been made, and that said testator was not the owner of any personal property at the time of his decease except some farming tools and household furniture which did not exceed six hundred dollars in value.

Fourth.—That said was the owner of a certain farm at the time of his death which was located in the Town of East Greenbush, Rensselaer County, N. Y., and which was then of the value of about twenty-five hundred dollars (\$2,500). That said farm is briefly described as follows:

(Insert description.)

That said owned no other real estate at the time of his death.

Fifth.—That, the widow of said deceased, is still living and is now about seventy-two years of age, and that the income and use of said farm and personal property is not sufficient for the good and comfortable support of testator's said widow.

Sixth.—That there are now no creditors of said testator except said, who holds a claim of \$900, and the only persons interested in said real estate are your petitioner, to whom was given an undivided three-fourths of said estate, subject to the life estate of said widow, and a grand-daughter of said

testator,, to whom was given an undivided one-fourth of said estate, to be held in trust until said grand-daughter should become twenty-five years of age. That said is living and is now about 15 years of age.

Seventh.—That under the provisions of said will, the executor thereof is authorized to sell said real estate in case the income and use of the estate of testator is not enough for the good and comfortable support of testator's widow, and your petitioner now has an opportunity to sell said farm for the sum of five thousand dollars (\$5,000), which your petitioner deems a fair and reasonable price for the same.

Your petitioner therefore prays that the surrogate inquire into the facts and circumstances and hear the opinions of witnesses as to the value of such property, and that the surrogate give such advice and direction to your petitioner in regard to the sale thereof as shall seem to him to the best interests of all parties interested therein, and that notice of this application may be given to the said and to the said and all others interested herein.

Dated June 1, 1921.

.....,

Petitioner.

(Add verification.)

FORM No. 302.

Order Giving Directions as to Voluntary Sale of Real Property.

[§ 215, ¶ 225]

At a Surrogate's Court, held in and for the County of
Rensselaer, at the Surrogate's Office in the City of
Troy, on the day of, 1921.

Present:, Surrogate.

<p>In the matter of the application of, as executor of the last will and testament of, late of the town of East Greenbush, N. Y., <div style="text-align: right;">Deceased,</div> for the sale of certain real estate.</p>	}
--	---

The above-named, as executor of the last will and testament of, late of the Town of East Greenbush, N. Y., deceased, having heretofore duly filed his petition asking that the surrogate inquire into the facts and circumstances and hear the opinions of witnesses as to the value of certain real property owned by, late of the town of East Green-

bush, N. Y., deceased, at the time of his death, and asking the advice and direction of the surrogate in regard to the sale of said real property, which petition was duly verified; and a citation having been duly issued to all persons interested therein, and said citation having been duly returned with proof of due service thereof on, a minor, and, the widow of said, deceased having duly waived the issue and service of citation upon her herein; and the petitioner having appeared upon the return day of said citation by, his attorney, and the surrogate having duly appointed, of Troy, N. Y., to be special guardian of said in this proceeding, and the said, having duly filed his consent to act as such special guardian; and the surrogate having thereupon proceeded to inquire into the facts and circumstances set forth in the petition and having read and filed the affidavit of, verified April 15, 1921, the affidavit of, verified April 13, 1921, the affidavit of, verified April 13, 1921, and the affidavit of, verified April 13, 1921; and the said, special guardian, having filed his report showing that he has examined into the facts and circumstances stated in said petition on behalf of said infant, and that there is no objection to the sale of the real property described in the petition for the sum therein specified, and the surrogate being satisfied that the facts and circumstances stated in the petition are true and that the sum of \$5,000 is a fair price for the real property described in the petition, and that the best interests of all parties interested in said property require that said property be sold for said sum and that the income and use of said property and of the personal property left by said deceased is not sufficient for the good and comfortable support of said, the widow of said testator,; now on motion of, attorney for, the petitioner herein, it is

Ordered, Adjudged and Decreed, That the said, as the executor of the last will and testament of, deceased, be and he hereby is authorized and directed to sell and convey the real property described in the petition for the sum of five thousand dollars (\$5,000) upon such terms as he may deem advisable, and that said executor hold and invest the proceeds of said sale and use the same in accordance with the provisions of the last will and testament of said, deceased.

And it is further

Ordered, Adjudged and Decreed, That the petitioner herein be and he hereby is allowed the sum of for his disbursements and attorney's fee on this proceeding, and the, as special guardian for said infant, be and he hereby is allowed the sum of for his services as such special guardian herein.

That the real estate which said executor is hereby authorized and directed to sell and convey is described as follows, namely:

(Insert description.)

.....,

Surrogate.

FORM No. 303.

Petition for Authority to Collect Rents of Real Property.

[§ 232, ¶ 245]

SURROGATE'S COURT, County of

In the matter of the petition of	}
for leave to collect the rents of the real	
property of,	
	Deceased.

To the Surrogate's Court of the County of

The petition of of the of, respectfully shows:

That your petitioner is the executor (administrator) of the above named decedent; that the amount and value of the personal property which has come to the hands of your petitioner of which he has any knowledge belonging to the estate of the deceased will not exceed \$.....; that the debts and funeral expenses so far ascertained by your petitioner against said deceased, together with the expenses of administration, are substantially as follows: . . .

That the deceased left real property briefly described as follows:

That the following named persons have the legal title to such property as heirs at law (or devisees), namely:

That it is necessary to resort to said real estate, or a part thereof, for the payment and satisfaction of the charges made against the same by section 234 of the Surrogate's Court Act.

That there are no other persons than those mentioned interested in this application.

Wherefore, the petitioner prays for an order authorizing him to enter into possession of said real estate and to manage and control the same, and receive the rents thereof until the further order of the court.

Dated,

.....,

Petitioner.

(Verification.)

FORM No. 304.**Order Allowing Collection of Rents.**

[§ 232, ¶ 245]

At a term of the Surrogate's Court of the County of
, held at the Court House in the city of
, New York, on the day of,
 192..

Present: Hon.

In the matter of the petition of
 for leave to collect the rents of the real
 property of,

Deceased.

Upon reading and filing the petition of and due proof of
 service of the citation upon, and it appearing to the satisfaction
 of the court that the case is one specified in section 232 of the Surrogate's
 Court Act, and after hearing; on motion of, attorney
 for petitioner,

It is Ordered, that said petitioner be and hereby is authorized to enter
 into possession of the real property of the above-named deceased described
 in said petition, and to manage and control the same and to receive the rents
 thereof until the further order of the court; and to hold such rents and
 bring them into court on the judicial settlement of his accounts.

.....,
 Surrogate.

FORM No. 305.

**Petition to Supreme Court for Transfer of Fund from Control of
 Supreme Court to Control of Surrogate's Court, and Order Thereon.**

SUPREME COURT, Rensselaer County.

(Title of the action.)

To the Supreme Court of the State of New York:

The petition of respectfully shows to the Court as follows:

First. That died at the City of Troy, Rensselaer County, N. Y.,
 on or about the day of, 192..., having been seized and
 possessed of real property situated in said County of Rensselaer at the time of
 his death.

Second. That during the lifetime of the said he made and executed a mortgage covering his said real property or a part thereof, which mortgage was, subsequent to the death of said decedent, foreclosed by a judgment of this Court.

Third. That it appears by the judgment in said foreclosure action that there was a surplus of the proceeds of sale after paying the expenses of sale and satisfying the mortgage debt and costs of the action, which surplus was, by the direction of said judgment, paid into Court for the use of the person or persons entitled thereto, by paying the same to the County Treasurer of the County of Rensselaer.

Fourth. That your petitioner, was within two years before the said foreclosure sale, to wit: the day of, 192., duly appointed administrator of the goods, chattels and credits of by the Surrogate's Court of the County of Rensselaer.

Fifth. That such proceedings are now pending (or are about to be brought) in the said Surrogate's Court of Rensselaer County where the mortgage, lease or sale of said decedent's real property for the payment of his debts, funeral expenses, etc., will be directed by the decree of the Surrogate in said proceedings out of the surplus moneys arising upon the aforesaid mortgage foreclosure sale, which moneys are now in the hands of the said County Treasurer of Rensselaer County.

Sixth. That all of the personal property left by, the above-named decedent, and which has been administered upon by your petitioner as such administrator, has been applied toward the payment of the debts, funeral expenses, etc., of the decedent, that such personal property was insufficient to pay the debts of the decedent.

Wherefore, your petitioner prays that an order may be made by this Court amending the judgment in said foreclosure action and directing the said surplus moneys so held by the County Treasurer of Rensselaer County in said action to be held by him subject to the order of the Surrogate of Rensselaer County.

And your petitioner as in duty bound will ever pray, etc.

(Add verification.)

Order Transferring Fund.

(Title.)

(Caption.)

Upon reading and filing the petition of, administrator of the goods, chattels and credits of, late of the City of Troy in the County of Rensselaer, deceased, praying that the surplus moneys arising in the above-entitled action and directed by the judgment therein to be paid into court by paying the same to the County Treasurer of the County of Rensselaer, be transferred by the said County Treasurer, subject to the order of the Surrogate of Rensselaer County, for the payment of his debts, funeral expenses, etc.; it is

Ordered, That the judgment in the above-entitled action be amended so as to direct the said surplus moneys to be paid into Court by paying the same to the said Treasurer of Rensselaer County, subject to the order of the Surrogate of Rensselaer County.

FORM No. 306.

Citation to Show Cause on Application to Dispose of Real Property of a Deceased Person as Part of Judicial Settlement.

[§ 236, ¶ 248]

THE PEOPLE OF THE STATE OF NEW YORK,

To, Send Greeting:

Whereas,, of, has presented a petition to our Surrogate's Court of County, praying for a judicial settlement of his account as such, and application having been made in such proceeding for the disposition of the real property owned by said deceased.

Therefore, you are cited to appear before the Surrogate of County at a Surrogate's Court to be held at the Court House, in the City of, N. Y., on the day of, 19..., at ten o'clock in the forenoon, to show cause, if any, why such application should not be granted.

In Testimony Whereof, we have caused the seal of our Surrogate's Court to be hereunto affixed.

Witness, Hon., Surrogate of the County of
[L. S.] at the Surrogate's office in the City of, this day of, in the year of our Lord, one thousand nine hundred

.....,
Clerk of the Surrogate's Court.

.....,
Attorney for Petitioner.

Office and P. O. Address,
.....

STATE OF NEW YORK, }
Cayuga County, } ss.:

....., of the of, in the County of Cayuga, being duly sworn, deposes and says, that he served the within citation on the persons next hereinafter named, at the time and place set opposite the name of each of them, respectively, by delivering to, and leaving with each of them, personally, a true copy thereof, and that he knew the persons so served to be the persons named in and to whom said citation is directed; that deponent is over years of age.

Names of Persons Served.	When Served.	Where Served.
.....
.....
.....

Subscribed and sworn to before me, this }
 day of, 19... }

I hereby admit due and personal service of the within citation, this
 day, 19...

STATE OF, }
 County of, } ss.:

On this day of, 19..., before me personally appeared
, known to me to be the same person described in the within
 citation, and who executed the foregoing admission of service respectively,
 and severally acknowledged the execution thereof.

FORM No. 307.

Citation on Application to Sell Real Estate in Proceedings for Judicial Settlement.

[§ 236, ¶ 248]

THE PEOPLE OF THE STATE OF NEW YORK,

By the Grace of God, Free and Independent.

To Margaret Killian, widow of John Killian; William Killian, "Mary" Killian, his wife, first name "Mary" being fictitious, real first name unknown to petitioner;; and all others interested in the Estate of Patrick F. Killian, late of the City of, in the County of, deceased, as creditors, heirs, next of kin, or otherwise, send greeting:

You and each of you are hereby required to show cause before our Surrogate of the County of at the Surrogate's Court, in the County Court House, in the City of, New York, on the day of, 192..., at ten o'clock in the forenoon of that day, why the account of proceedings of, as administratrix of the goods, chattels and credits of said Patrick F. Killian, deceased, should not be judicially settled and allowed, and why the real property set forth in the petition herein of which said Patrick F. Killian, deceased, died seized should not be sold for the payment of debts and administration expenses, and the balance of the proceeds thereof after such

payment, distributed according to law to the persons entitled thereto, in accordance with the statute in such case made and provided.

In Testimony Whereof, we have caused the seal of office of our said Surrogate to be hereunto affixed.

Witness, Hon, Surrogate of our said County, at the City of, the day of, A. D., 1921.

.....,
Clerk of the Surrogate's Court.

FORM No. 308.

Order to Mortgage, Lease or Sell Real Property for Payment of Debts and Charges.

[§ 238, ¶ 251]

At a Surrogate's Court held in and for the County of, at the Court House, in the City of, on the day of, A. D., 19...

Present: Hon., Surrogate.

In the matter of the judicial settlement of the accounts of as executor (administrator) of,
Deceased.

..... the administrator (executor) of, late of the of, in the County of, New York, deceased, having commenced this proceeding for the judicial settlement of h.. accounts as such administrator (executor) and a citation having been duly issued out of this court to all the persons named in the petition, citing them to appear before this Court on the day of, 192.., at ten o'clock in the forenoon of that day, to show cause why a decree should not be made judicially settling said account and thereafter a supplemental citation having been issued to all other persons interested in the application for the disposition of the real property of the deceased, to show cause in said court on the day of, 192..., why such application should not be granted; and said citations having been returned, with proof of the due and legal service thereof upon all the aforesaid parties to whom the same was directed and the following parties having duly appeared in this proceeding:

And the said matter having been regularly called in open court, and the proper proceedings in due form of law having been thereupon had, and the allegations and proof of the parties having thereupon been heard:

And it appearing to the court that the claims and charges against the estate of said decedent cannot be paid without resorting to the real property of said decedent (or set forth all other reasons upon which the application was based).

Now, therefore, it is ordered and adjudged that the following matters have been sufficiently and satisfactorily proven and established:

I. That it is necessary to mortgage, lease or sell the whole or some part of the real estate left by the deceased for one or more of the purposes specified in section 234 of the Surrogate's Court Act.

II. That the debts, for the payment of which this order is made, are the debts of the decedent, or are just and reasonable charges for h.. funeral and administration expenses and are justly due and owing, and that the following claims for the purpose of paying which this order is made, have been duly proved or admitted and are valid and subsisting debts and claims against said decedent's real property and estate, to wit:

Names of Creditors.	When Due.	Nature of Claim.	Amount.
.....
.....
.....
.....

III. That the claims above allowed amount in the aggregate, exclusive of interest, to \$..... That none of said debts are secured by any judgment or mortgage.

IV. That said deceased died seized of the real property hereinafter described and that the same is not subject to any valid power of sale for the payment of any of the charges against the same hereinbefore specified.

V. That the said of the estate of said decedent ha.... proceeded with reasonable diligence in converting the personal property of said decedent into money and applying the same to the payment of claims and charges against the estate of said decedent, and that the personal property of said decedent is insufficient for the payment of the same as established by this order.

And the court having thereupon duly inquired whether sufficient money can be raised advantageously to the persons interested in the real property of said decedent, by a mortgage or lease of the real property of which the said decedent died seized, or a part thereof, and it appearing to the court upon the inquiry made as aforesaid, that sufficient money cannot be raised advantageously to the persons interested in said real property or interest in real property hereinafter described, by mortgage or lease thereof;

Now, on motion of, attorney for the said,

It is ordered, adjudged and decreed:

I. That the personal property of said decedent is insufficient for the payment of the debts and funeral and administration expenses of said decedent.

II. That the aforesaid claims and demands of the persons hereinbefore named in the amounts hereinbefore respectively stated are valid and subsisting debts, claims and demands against said decedent's estate.

It is hereby ordered, that the real property or interest in real property hereinafter described, be sold, at public sale, or at a private sale at a price not less than the value thereof, by the said (where any of such

property has been devised or sold designate the order of sale), upon h... giving the bond prescribed by law in the penalty of dollars, to be approved by the Surrogate, and that he make report thereof to this court with all convenient speed.

And it is further ordered that this proceeding be adjourned to at ten o'clock in the forenoon to await the proceedings to be taken under this order.

That the property so ordered to be mortgage (leased or sold) is described as follows:

Order to Sell for Distribution Where There Are Infant, Incompetent or Unknown Owners.

[§ 238, ¶ 251]

Follow former form down to recital that debts, etc., cannot be paid, and then insert as follows:

And it appearing that the decedent left the hereinafter described real property

And it appearing that such real property has in whole or in part descended to (or is devised to), who are infants (proven or adjudged incompetents) (absentees or persons unknown), and that it is for the interest of the said persons that the said real estate should be sold for the purpose of distribution of the proceeds thereof among the parties entitled thereto.

Now, on motion of, attorney for, it is ordered:

That, the, of the said, deceased, be and he is hereby empowered to sell the following described real property for the purpose of distributing the proceeds thereof to the persons entitled thereto.

And it is further ordered, adjudged and decreed that before executing the power conferred upon him by this order the said first execute, and file with the Surrogate of County bond, with two sureties to the people of the State of New York in the penalty of \$....., conditioned for the faithful performance of the duties imposed upon by this order and for the accounting by of all moneys received by whenever is required so to do by a court of competent jurisdiction.

The real property above mentioned to be sold as above provided is particularly described as follows:

It is further ordered and determined that the rights and interests of the respective parties in and to such real estate are as follows:

And it appearing that of such parties is unknown, the share of such proceeds belonging to such unknown party shall be paid into court.

It is further ordered, that the said make report of his proceedings under this order with all convenient speed, and that this proceeding be adjourned to the day of, 19..., at 10 o'clock A. M., to await such report.

Order to Bring Into the Account Proceeds of Sale of Real Property Had in Another Court.

Follow the first form of order down to subdivision IV and then continue as follows:

IV. That the said deceased died seized of certain real property briefly described as follows:

That the same has been sold since his death by a judgment of the Court of the County of, and that by such judgment (or amended judgment) the proceeds of such sale are ordered paid into court subject to the order of this court, and that they have been so paid in as shown by the certificate of the treasurer of the County of, filed in this proceeding.

V. That, ha.... proceeded with reasonable diligence in converting the personal property belonging to said decedent's estate into money and applying it to the payment of the claims and charges against the estate of the decedent, and that it is insufficient for the payment of the same.

Now, on motion of, attorney for the, it is ordered, that said be and he hereby is authorized to receive from the treasurer of the County of the said sum of \$..... so directed to be paid into court, subject to the order of this court, less the fees of such treasurer, upon his executing and filing with the said Surrogate a bond, with two sureties, to the people of the State of New York, in the penalty of \$....., conditioned for the faithful performance of the duties imposed upon h.. by this decree and for the accounting by h.. of all moneys received by h.. whenever he required so to do by a court of competent jurisdiction.

And it is further ordered, that said make a report of the receipt of said proceeds with all convenient speed, and that this proceeding be adjourned to the day of, 19...

FORM No. 309.

Bond for Proceeds of Sale of Real Estate.

[§ 239, ¶ 253]

Know all men by these presents, that we as principal and and as sureties, are held and firmly bound unto the people of the State of New York, in the sum of dollars, lawful money of the United States of America, to be paid to the said people, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this day of, in the year of our Lord, one thousand nine hundred and twenty.

Whereas, by an order of the Surrogate's Court of County, the above named was empowered to certain real property of the said, deceased, for the purpose therein mentioned.

Now, therefore, the condition of this obligation is such that if the above bounden of, deceased, shall faithfully perform the duties imposed upon h.. by the said decree, and shall account for all moneys received by h.. whenever he is required so to do by a court of competent jurisdiction, then this obligation to be void, otherwise to remain in full force.

Sealed and delivered in }
the present of }

..... [L. S.]
..... [L. S.]
..... [L. S.]
..... [L. S.]

(Add acknowledgment and justification of sureties.)

FORM No. 310.

Report of Mortgage, Lease or Sale.

[§ 240, ¶ 253]

SURROGATE'S COURT County of

In the matter of the disposition of the real
property of,

Deceased.

To the Surrogate's Court:

I,, the, of, deceased, report and return my proceedings under an order of this court, dated the day of, 192.., directing me to

On the day of, 192.., I duly the real property mentioned in said order to of, for the sum of \$....., and he has paid me for the same in full (or has entered into a contract to pay for the same within days after the confirmation of such sale.)

That such sale was made at auction after notice given as follows: and that the following named persons who are interested in such property attended such sale,

That the price bid by the said purchaser was the highest price bid on such sale, or

That such sale was made at private sale, after I had made the following efforts to find a purchaser therefor (state efforts made and prices offered).

That I verily believe that the sum so obtained is the best selling price I can get for such property within a reasonable time, and as much as said property would bring at public sale.

Dated,, 192..

(Add verification.)

.....

FORM No. 311.

Supplemental Account After Confirmation of Sale, Mortgage or Lease.

[§ 242, ¶ 254]

(Title.)

I,, the of, deceased, make and file my account of receipts and disbursements in this matter to be taken as a supplemental account in my judicial settlement:

Receipts.

Received proceeds of real property as follows:

....., 192.., received from \$.....

Disbursements.

Paid or incurred expenses as follows:

....., 192.., for surety bond \$.....
 " advertising sale
 " search of property
 " auctioneer
 " drawing contract and deed.....

Total \$.....

(Add verification.)

FORM No. 312.

Part of Final Decree on Judicial Settlement Concerning Disposition of Real Property.

[§ 242, ¶ 254]

Insert in the usual decree of judicial settlement as follows:

And it having been made to appear on this judicial settlement that it was necessary to resort to the real property of the deceased for one or more of the purposes specified in section 234 of the Surrogate's Court Act, and to that end an order having been granted by this court on the day of, 192.., authorizing and directing the of said deceased to* said real property, and said real property having been duly pursuant to such order, and a report and supplemental account thereof made (or insert at *), to receive the proceeds of the sale of the real property of the deceased had in the court from the treasurer of the County of and bring the same into his account in this proceeding.

It is Ordered and Decreed, that said report and sale (or the report of receipt of proceeds of sale from the county treasurer) be and the same are hereby confirmed, and the said account be and the same is hereby allowed and settled.

It is Further Ordered and Decreed, that the said be charged in his account and supplemental account with the sum of \$. being the proceeds of all the real and personal estate of said deceased; and that he be credited with, etc. (continue as in usual decree).

Where Sale Is Had for Distribution.

Insert at end of decree on judicial settlement direction for distribution and payment of the respective shares, following in a general way the recitals in the prior order, Form No. 308, concerning distribution.

Deed in Confirmation of Title.

Insert at end of decree that evidence has been taken as to who were the devisees or heirs-at-law, and that they were determined to be certain persons named, taking certain designated shares, and authorize conveyance to them.

FORM No. 313.

Deed of Real Property Pursuant to Order of Surrogate's Court.

[§ 240, ¶ 254]

This indenture, made the day of, in the year one thousand nine hundred and, between, residing in the Town of Nassau, Rensselaer County, New York, administratrix of the goods, chattels and credits of, late of the Town of Nassau, Rensselaer County, New York, deceased, party of the first part and, residing in the Town of Nassau, Rensselaer County, New York, party of the second part, witnesseth.

Whereas such proceedings have been had and taken in the Surrogate's Court of County upon the judicial settlement of the account of as of, late of, deceased, that by an order of said Surrogate's Court dated the day of, 192.., the said was duly authorized to the real property owned by said deceased at the time of ..h.. death for the purposes therein mentioned the same being one of the purposes set forth in section 234 of the Surrogate's Court Act; and said sale having been duly made to the party of the second part and said sale duly confirmed; now therefore by virtue of the authority in me vested by the said proceedings and orders of the Surrogate's Court of County, and in consideration of the sum of dollars to me in hand paid the receipt whereof is hereby acknowledged, the party of the first part does hereby sell, transfer, release and convey unto the party of the second part ..h.. heirs and assigns forever the following described premises:

Together with the appurtenances and also all the estate which the said had at the time of ..h.. decease in said premises and also the estate therein which the said party of the first part has or has power to dispose of whether individually or by virtue of said orders or otherwise.

To have and to hold the above granted premises unto the party of the second part ..h.. heirs and assigns forever and the said party of the first part covenants with the said party of the second part that the party of the first part has not done or suffered anything whereby the said premises have been incumbered in any way whatever.

In Witnesseth Whereof, the said party of the first part has hereto set ..h.. hand and seal this day of, 192..

.....
As

(Add acknowledgment.)

FORM No. 314.

Petition to Supreme Court to Withdraw Surplus Fund in Partition After Judicial Settlement in Surrogate's Court.

[Civil Practice Act, § 1047]

(Title of Supreme Court action.)

To the Supreme Court of the State of New York:

The petition of residing at in the County of, N. Y., respectfully shows to this court:

First.—That your petitioner was a party defendant in the above-entitled action; that in and by virtue of the interlocutory judgment in such action a sale of certain real estate owned and possessed by at the time of his death was directed to be made for the purpose of partition and division of the proceeds thereof; that such sale has been duly had and the surplus arising thereon duly paid to the county treasurer of the County of, N. Y., and now remains on deposit in such county treasurer's office, by virtue of the provisions of the final judgment in such action, as more fully appears by the certificate of the county treasurer hereto annexed marked "A" and made a part of this petition.

Second.—That in and by the final judgment in said action of partition and sale your petitioner was adjudged to be the owner of and entitled to the sum of \$....., part of the surplus proceeds of such sale.

Third.—That the estate of the said, deceased, has been judicially administered in the Surrogate's Court of the County of, N. Y., in which a final settlement was had on or about the day of, 19.., and on that day a decree of judicial settlement was made and entered in said Surrogate's office, which decree shows that all of the debts of the said decedent have been paid in full, as is more fully shown by a certified copy of said decree and final account hereto annexed and marked "B" and "C" respectively, and made a part of this petition.

Wherefore your petitioner prays that an order of this court may be made

directing the treasurer of the County of, N. Y., to pay to your petitioner the amount adjudged in and by said final judgment to belong to and to be payable to him with any and all interest accrued thereon less the legal fees of the county treasurer, in accordance with the provisions of section 1047 of the Civil Practice Act.

.....,
Petitioner.

(Add verification.)

ORDER.

(Title of Supreme Court action and caption.)

Upon reading and filing the petition of and the account and decree of County Surrogate's Court annexed to said petition, and upon all papers filed in said action, together with due proof of the service of a notice of this application upon the executor (or administrator) of the estate of, deceased;

Now, upon motion of, attorney for said petitioner, no one appearing in opposition thereto

It is Ordered, that the giving of a bond by the petitioner be dispensed with, and that (follow prayer of petition).

FORM No. 315.

Petition for Sale Real Estate to Pay Debts, etc., after Judicial Settlement Begun.

SURROGATE'S COURT, Rensselaer County.

In the matter of the application of
as executor of the last will and testament
of,

Deceased,

for leave to convey real property of said
deceased.

To the Surrogate's Court of the County of Rensselaer:

The petition of, residing in the City of Troy, N. Y., respectfully shows:

That, late of the City of Troy, N. Y., died in said City of Troy on or about December 17, 1916. That said deceased left a last will and testament which was duly admitted to probate in this court on January 10, 1917, and letters testamentary thereupon were issued to petitioner, who duly qualified and is now acting as such executor. That the record of said will in this court is hereby referred to for greater certainty and hereby made part of this petition.

That the names and post-office addresses of all the heirs-at-law and next of

kin, legatees, devisees and beneficiaries named in the said last will and testament of said deceased are as follows:

That the names and post-office address of the creditors of decedent are as follows:

That all of the persons named are of full age and of sound mind, except that said and are infants, the former over, the latter under fourteen years of age and both reside with their mother said at No. 15 Chestnut street, Schenectady, N. Y. That there are no persons interested in this proceeding in any manner other than those hereinbefore stated.

That the personal property left by decedent amounts to \$3,778.04, as appears by the inventory filed in this court on October 17, 1917, reference to which is hereby made for greater certainty and made part of this petition.

That no personal property except as stated in said inventory has come into the hands of this petitioner, and said deceased left no other personal property.

That the funeral expenses and claims presented to and allowed by the executor amount to \$7,827.21. That the estate of said deceased is in arrears for dues and interest due the Pioneer Building-Loan & Savings Association the sum of about \$700. That the personal property left by the deceased is insufficient for the payment of the just demands and charges against the same. That Schedule A hereto annexed and made part of this petition contains a statement of the funeral expenses of said deceased.

SCHEDULE "A"

That all of said charges have been paid.

Schedule B contains a statement of debts of the decedent as presented, allowed and paid.

SCHEDULE "B"

Schedule C contains a statement of debts presented and allowed and remaining unpaid.

SCHEDULE "C"

That said deceased died seized and possessed of the following real estate situate in the City of Troy, Rensselaer County, N. Y.:
(insert description).

That the foregoing premises are subject to a certain mortgage executed by the said deceased to the Pioneer Building-Loan & Savings Association in the sum of \$11,000.

That the forty-four shares of stock of the Pioneer Building-Loan & Savings Association held by the said deceased at the time of his death and of the value of about \$1,160 are held by said loan association as collateral security for said mortgage debt.

That the said deceased owned an undivided one-half interest in the following described real estate situate in the City of Schenectady, N. Y., to wit:

(Insert description.)

That the said last described real estate is subject to a mortgage held by the Schenectady Savings Bank in the sum of \$1,500 with interest at six per cent. from January 1, 1920.

That, the wife of said, deceased, died before the said

That the legacy of five hundred dollars (\$500) to, in paragraph "6" of said last will and testament of said deceased has not been fully paid because of insufficient funds to pay the same. That there is due thereon, the sum of \$40.

That there is now pending in this court a proceeding for the judicial settlement of the accounts of said, as executor of the last will and testament of the above-named deceased.

That the above-described real property has not been aliened or incumbered in any way by the heirs-at-law or by the devisees of the decedent.

That no previous application has been made for the relief asked for herein except that a similar petition was presented in this court on May 1, 1920, which has been withdrawn by petitioner, no one appearing therein.

Wherefore, your petitioner prays that a citation may issue herein citing all persons interested in the real estate of said decedent or in any questions raised with reference to the sale of real property of said deceased, to show cause why the said real estate of said deceased should not be sold for the purpose of settling the estate and payment of the debts and legacies charged upon said real estate.

Dated, May 26, 1920.

.....,

Petitioner.

(Add verification.)

NOTE.—This form may be used when an order for sale is made in proceedings for judicial settlement after the eighteen months have expired as allowed by recent amendment.

SURROGATE'S COURT, Rensselaer County.

In the matter of the application of,
as executor of the last will and testament
of,

Deceased,

for leave to convey real property of said
deceased.

STATE OF NEW YORK,
County of Rensselaer,
City of Troy,

ss.:

....., being duly sworn deposes and says that he is the executor of the last will and testament of, deceased, and resides in the City of Troy, N. Y. That deponent formerly resided in the City of Schenectady and formerly owned the one-half interest in the property owned by the decedent in his lifetime in Schenectady, N. Y., and is familiar with the condition and value of the same. That the premises consist of a city lot known as No. 15

Chestnut street with the two-story frame dwelling thereon, which is subject to a mortgage upon which there is due the sum of \$1,500 and interest from January 1st last. The property is assessed at \$3,600 and the first floor is occupied by and her two children, they being the widow and children of a deceased son of, deceased, and being parties in interest here. The upper floor rents for \$20 per month. Said has offered \$2,000 cash for the said one-half interest subject to the foregoing mortgage, which she agrees to assume and pay, this I believe to be the fair and reasonable value thereof. Said premises are worth not to exceed \$5,500.

Sworn to before me this }
day of June, 1920. }

FORM No. 316.

Citation in Proceedings to Sell Real Estate to Pay Debts and Charges after Judicial Settlement Begun.

Usual citation, containing the following "to show cause why the real estate or interest in real estate of, deceased, in the petition should not be mortgaged, leased or sold for the purposes specified in the petition."

Make the same proof of necessary facts as in case where mortgage, lease or sale is had on judicial settlement, and obtain order to sell, give bond, execute sale, and make report of sale, mortgage or lease, stating proceeds received and disbursements incurred, using the forms outlined for that proceeding. The following decree directs the payment of expenses and that the proceeds be brought into the judicial settlement proceedings to be disposed of there.

FORM No. 317.

Decree on Sale of Real Property to Pay Debts and Charges.

[§§ 233, 242, ¶ 254]

(Title.)

(Caption.)

A petition having been heretofore filed in this court by administrator (or executor) of the estate of praying for a sale of the real estate or interest in real estate of, deceased, and therein described; and a citation having been issued thereon to all parties interested in such proceeding to show cause in this court on the day of, 192.., why the prayer of such petition should not be granted; and said petitioner having appeared on such return day, and filed due proof of the service of such citation on all the parties named therein, and having been represented by, Esq., his attorney, and there having also appeared on such return day of full age, and it appearing that a person interested is an infant (or incompetent),, Esq., was duly appointed special guardian for said and filed his consent and duly appeared (or, and there being no other appearances) and the Surrogate having heard and con-

sidered the proofs and allegations of the parties, and being satisfied that this proceeding was begun during the pendency of a proceeding for judicial settlement of the accounts of the of the estate of said deceased and that the real property or interest in real property sought to be disposed of has not been aliened or incumbered by the heirs-at-law (or the devisees) of the decedent prior to the institution of this proceeding; and said Surrogate being further satisfied that the requisite facts exist which authorize him to order and direct a sale (mortgage or lease) of the real estate or interest therein described in the petition for one or more of the purposes described in the petition; and said having in pursuance of a former order of this court, dated the day of, 192., sold (mortgaged or leased) said real property, after filing the required bond, and made his report of sale (mortgage or lease), and having brought the proceeds into court, now on motion of, Esq., attorney for said it is ordered, adjudged and decreed that the sale (mortgage or lease) of the real property described in the petition and the report of said sale (mortgage or lease) and all the proceedings had and taken under said order of sale (mortgage or lease) be and they hereby are in all things confirmed; and it is further decreed that out of the proceeds of sale the executor retain his disbursements set forth in said report of sale, and the further sum of dollars for his commissions to which he is entitled and dollars for his counsel fees, and pay to, Esq., special guardian for the interested the sum of dollars, and that the balance of said proceeds he pay to himself as of said deceased and bring the same into this court by supplemental account filed in his proceeding for the judicial settlement of said estate now pending and pay out and distribute the same in accordance with the decree of judicial settlement in such proceeding when made, and it is further decreed that said having fully performed his duties in this proceeding be discharged, together with the sureties on his bond given herein, upon his making the payments herein directed to be made and the further payment or distribution of said proceeds as and when ordered by said decree of judicial settlement.

In testimony, etc.

FORM No. 318.

Exception to Decision of Surrogate.

SURROGATE'S COURT, County of

In the matter of the final judicial settlement of the accounts of as, etc.
--

..... a contestant of the accounts of as
of, hereby excepts to the decision of the Surrogate of the County
of in the above-entitled matter filed in his office on the
day of, 192., and to each and every part thereof and to the

findings of fact and conclusions of law contained in said decision whether explicitly stated therein or necessary to be found to support of such decision.

Dated,

.....,
Contestant.

.....,
Attorneys for Contestant.

Office and Post-Office Address,
.....

FORM No. 319.

Notice of Appeal.

(Title.)

Gentlemen.—Please take notice that contestant hereby appeals to the Appellate Division of the Supreme Court within and for the Judicial Department of the State of New York from the decree entered in the above-entitled matter in the office of the Surrogate of the County of on the day of, 192., which overruled the objections of the said, etc.

And this appellant appeals from the whole and from every part of the said decree overruling said objections and allowing said charges and items both upon the law and upon the facts.

Dated,

To

(Name all parties who have appeared and "the Surrogate of the County of)."

.....,
Attorney for Appellant.

Office and Post-Office Address,
.....

FORM No. 320.

Notice of Appeal.

[§ 293, ¶ 165]

SURROGATE'S COURT, Rensselaer County.

In the matter of the judicial settlement of
the accounts of, as executor of
the last will and testament of
Deceased.

Gentlemen:

Notice is hereby given that, as executor of the will of, deceased, hereby appeals to the Appellate Division of the Supreme Court in and

for the Judicial Department from the decree entered in this matter in the Surrogate's Court of the County of Rensselaer on the day of, 192.., and from each and every part of said decree; and that the executor upon such appeal will seek to review and will bring up for review every decision and determination of the Surrogate to which an exception is taken by the executor either upon the trial before the Surrogate or subsequently taken by the filing of an exception in the Surrogate's office, including therein as well questions raised by any requests to find and exceptions to refusals and exceptions to finding made upon the settlement of the case as provided by the provisions of the Civil Practice Act.

.....,
Attorney for Appellant,
Office and postoffice address,
Cannon Place,
Troy, N. Y.
To the Clerk of the Surrogate's Court, Rensselaer County;
....., Esqs., attorneys for

FORM No. 321.
Waiver of Undertaking.

(Title.)
.....
The undertaking required to be given to perfect the appeal, and the further undertaking required to stay the execution of the decree appealed from, dated the day of, 192.., are hereby waived and the said appeal shall be deemed to be perfected without the giving of any bond or undertaking, and the stay of execution of said decree shall operate until the hearing and determination of the said appeal, without the giving of any bond or undertaking for that purpose.
Dated,

.....,
Attorneys for

FORM No. 322.
Order Settling a Case.

The undersigned, the Surrogate of the County of, before whom the above-entitled proceeding was tried does hereby certify that the foregoing case and exceptions on appeal contains all the evidence given and proceedings had on the trial of said proceeding and the said case and exceptions is hereby settled and ordered filed pursuant to law.
Dated,

.....,
Surrogate of the County of

FORM No. 323.

Stipulation in Lieu of Clerk's Certificate.

It is hereby stipulated that the foregoing are true copies of the testimony taken and of (insert description of papers) and of the whole of each thereof and this stipulation is given in lieu of the certificate of the clerk to the same effect.

Dated,

.....,
 Attorney for Appellant,
 Office and Post-Office Address,

 Attorney for Respondent,
 Office and Post-Office Address,

FORM No. 324.

Stipulations as to Case on Appeal.

Stipulated, That the foregoing case on appeal, and the exceptions, including the judgment roll, the notice of appeal, the record of the trial, the requests made of the court, and all exhibits, in so far as they are any wise material to the questions raised by the exceptions, are correct copies of the originals thereof, on file in the Rensselaer County Surrogate's Office, and of the whole of said originals, and clerk's certificate is waived.

The case may be printed as above-contained, and order made annexing it to the judgment roll, and

Further stipulated, that the case contains all the evidence given at the trial and as to the exhibits that the foregoing case contains all that is material thereof.

Dated,, 192..

I hereby certify that the foregoing is the case and the exceptions, as settled by me, and that the same contains all the evidence given on the trial, and a full memoranda so far as material of all exhibits, and I direct that the same be printed as above-contained, and filed and annexed to the judgment roll of record herein.

Dated,, 192..

.....,
 Surrogate, Rensselaer County.

I, the undersigned, before whom this case was settled, do hereby order the foregoing printed case on appeal to be filed with the clerk of the Appellate Division, Department.

.....,
 Surrogate, Rensselaer County.

FORM No. 325.

Probate of Heirship—Petition.

[§ 311, ¶ 316]

SURROGATE'S COURT, Rensselaer County,

In the matter of the probate of the heirship	}
of, to certain lands whereof	
..... died seized.	

To the Surrogate's Court of the County of Rensselaer:

The petition of, of the City of Troy, N. Y., respectfully shows:

First.—That departed this life on or about, 1891, leaving no last will and testament, and being at the time of her death a resident of the City of Troy, in the County of Rensselaer and State of New York.

Second.—That the said died seized of the following described premises:

All that tract or parcel of land situate on the west side of First street (describe)

Third.—That the said left surviving her no husband, but five children:, now deceased;, who now resides in the City of Albany, N. Y.;, who now resides at New Brunswick, N. J.;, now deceased, and, who now resides at Evanston, Ill., her only heirs.

Fourth.—That your petitioner is informed and believes that no application has been made by anyone to any Surrogate's Court in this State for the probate of any alleged will of the said, deceased, and for letters of administration or temporary administration on her estate, and your petitioner verily believes that no Surrogate or Surrogate's Court of this State has acquired jurisdiction on the estate of the said

Fifth.—That on or about, 1893, the above-named, by a deed duly executed and recorded in Rensselaer County Clerk's office, in Book of Deeds No. 241, at page 505, conveyed all their right, title and interest in and to the above-described premises to the said

Sixth.—That thereafter the said departed this life leaving no husband but one son, your petitioner, surviving her as her only heir-at-law, and leaving a last will and testament, proved before the Surrogate of the County of Rensselaer on or about July 8, 1901, whereby she devised the above-described premises to your petitioner.

Seventh.—That the said departed this life on or about the year 1892, intestate, without ever having been married, leaving surviving her as her only heirs-at-law the said, and

Eighth.—That by reason of the facts above stated, the said

....., and, each became seized of an undivided one-fifth interest in the above-described premises upon the death of the said, and that your petitioner is now the owner of the entire fee to said premises.

Ninth.—That there are no other persons than those mentioned interested in the proceeding.

Wherefore, your petitioner prays that a decree may be made herein establishing the right to inheritance of said real property, and that all the heirs of the decedent, now living, may be cited to show cause why such decree should not be made.

And your petitioner further prays for an order directing service of citation herein personally without the State of New York, or by publication, upon the persons named herein as nonresidents, or who, or whose residences are unknown; and by publication upon the persons named herein as residents, who it is shown cannot be served within the State of New York.

Dated,, 192..

.....,
Petitioner.

(Add verification.)

FORM No. 326.

Citation.

[§ 311, ¶ 316]

To People of the State of New York:

To, of Albany, N. Y.,, of New Brunswick, N. J.,, of Evanston, Ill.,, of Troy, N. Y., heirs-at-law and next of kin of, late of the City of Troy, in the County of Rensselaer, deceased.

You and each of you are hereby cited to show cause before our Surrogate of the County of Rensselaer, in our Surrogate's Court, in the City of Troy, in said county, on the day of, 192.., at ten o'clock in the forenoon of that day why a decree should not be made probating the right of inheritance of the heirs of the said, deceased, in certain premises situate in the City of Troy, N. Y., described as being a parcel of land situate on the west side of First street, in said City of Troy.

In Testimony Whereof, we have caused the seal of office of our said Surrogate to be hereunto affixed.

Witness, Hon., Surrogate of said county at the City of [L.S.] Troy, the day of June, 192..

.....,
Clerk of Surrogate's Court.

Waiver of Citation.

SURROGATE'S COURT, Rensselaer County.

In the matter of the probate of the heirship of et al, to certain lands, whereof died seized.	}
---	---

I,, of the City of Albany, N. Y., one of the heirs-at-law of
....., late of the City of Troy, in the County of Rensselaer, deceased,
do hereby waive the issue and service of a citation in the above-entitled pro-
ceeding, and do hereby voluntarily appear in any proceeding instituted or to be
instituted for the probate of the right of inheritance of the heirs of the said
....., deceased, and I do hereby consent that a decree be granted and
entered in said proceeding, establishing the right of inheritance to the lands
whereof died seized, in,,
and

Dated,, 192..

(Add acknowledgment.)

FORM No. 327.**Decree.**

[§ 312, ¶ 316]

(Title.)

(Caption.)

The petition of, duly verified, having been duly filed in this
court, together with a waiver of the issue and service of citation, and consent
to the entering of this decree, by all interested parties.

And the said Surrogate having heard the allegations and proofs of the parties
and there being no contest respecting the heirship of any party, nor respecting
the share to which any party was entitled, as the heir of said,
and the Surrogate having inquired into the facts and circumstances of the
case, and the said having established by satisfactory evidence that
on or about March 31, 1891, died at the City of Troy, N. Y.,
which was at the time of death her place of residence, seized of the real property
in said petition mentioned and hereinafter described, intestate, leaving five
children and only five, her sole heirs-at-law, entitled to inherit in the manner
hereafter mentioned the said real property of which said died
seized.

That the said heirs so entitled to inherit, were,
..... and, all of full age, residing as
follows:

The said , at Troy, N. Y.
The said , at Albany, N. Y.
The said , at City of New Brunswick, N. J.
The said , at Evanston, Ill.
The said , at Troy, N. Y.
That the said left her surviving no husband.

That the said five above-named heirs are proved to be entitled to one-fifth share each in said real property.

And it is further made to appear that no application has been made to any Surrogate's Court in this State for the probate of any alleged will of the said or for letters of administration or temporary administration on her estate, and that no Surrogate's Court of this State has heretofore, prior to the institution of this proceeding, acquired any jurisdiction in the premises by reason of the commencement of any proceeding in reference to the estate of said deceased.

And it further appearing, from the records of this court, that the said has heretofore died, leaving a will, proved and recorded in this court, whereby she devised her property to her son, the petitioner,

Now, on motion of , attorneys for said petitioner,

It is Ordered, Adjudged and Decreed, that the right of inheritance of and , in and to the real property situate in the City of Troy, N. Y., of which said died seized, and which is hereinafter described, has been established to the satisfaction of the Surrogate of Rensselaer County, in accordance with the facts hereinbefore recited, and that said , , and , upon the death of the said , became and were entitled to an undivided one-fifth part or share of said real property, which said real property is bounded and described as follows:

Insert Description.

..... ,
Surrogate.

Decree—Different Facts.

(Title.)

(Caption.)

..... , of the Town of Albemarle, County of Stanly, State of North Carolina, having this day duly presented and filed his petition, praying that a decree be made establishing the right of inheritance to certain real property situate in the City of Troy, County of Rensselaer and State of New York, of which property died seized; and it appearing in and by said petition and being otherwise established to the satisfaction of the Surrogate that the said died intestate, survived by the said petitioner as his only heir-at-law, so that no citation is necessary; and the said Surrogate having heard the allegations and proofs submitted in behalf of the petitioner, and there being no contest concerning the heirship of any party or respecting the share of which any party is entitled as an heir of the said ;

and the Surrogate having inquired into the facts and circumstances of the case; and the said petitioner having established, by satisfactory evidence, that one died at Troy, in the County of Rensselaer, on the 4th day of November, 1880, seized of said real estate and leaving a last will and testament, in and by which said real estate was devised to his daughter,, and to her heirs forever; that thereafter the said became the wife of the said petitioner,; that on the day of, 1885, she died intestate, seized of the above-described real estate, and survived by her said husband, the said, and by one son said, her only heir-at-law; and that thereafter and on the day of, 1885, said, died, being then an infant about five weeks old intestate, seized of the said real estate, and survived by the said, his father and only heir-at-law; that the said died at the City of Brooklyn, N. Y., where he then resided, intestate, seized of the real estate hereinafter described, and that no Surrogate's Court has acquired jurisdiction; that his father, the said, is his only heir-at-law; now, therefore, on motion of, attorney for petitioner,

It is Ordered, Adjudged and Decreed, that the right of inheritance of the said, in and to the real property situated in the City of Troy, County of Rensselaer, and State of New York, of which, late of the City of Brooklyn, in the State of New York, died seized and which is hereinafter described has been established to the satisfaction of the Surrogate of Rensselaer County, in accordance with the facts hereinbefore recited; that the said real estate is bounded and described as follows:

(Insert Description.)

.....

Surrogate.

FORM No. 328.

Petition for Set-Off of Exempt Property.

[§ 201, ¶ 193]

(Title.)

To the Surrogate's Court of County:

The petition of residing at respectfully shows:

That your petitioner is (the widow, husband, etc.) of late of

That is the (executor or administrator) of the estate of the said deceased and letters were issued to him on or about the day of, 192., and that he has entered upon the discharge of his duties.

That the said deceased left certain personal property of the class known as exempt property which has come into the control of said, and which your petitioner is entitled to have set off to h.. and of which ..h.. is entitled to the use and possession.

That said has failed to make an accounting of the property of said deceased and to cause to be set off to your petitioner said exempt property.

That there are no other persons interested in the proceeding.

Wherefore, petitioner asks that an order be made requiring said to set apart such exempt property and money as the said, deceased, left and as the law directs, and if the same or any part thereof has been lost, injured or disposed of, that he pay the value thereof or the amount of the injury thereto and that he be cited to show cause why such a decree or order should not be made.

Dated,

(Add verification.)

FORM No. 329.

Petition for Proof of Nuncupative Will Made by Soldier.

SURROGATE'S COURT, County of Washington.

In the matter of the probate of the last will and testament of Hugh E Morrison, late of the town of Jackson, Washington County, New York,	}	Deceased.
--	---	-----------

To the Surrogate's Court of the County of Washington:

The petition of James Morrison of the Town of Jackson in the County of Washington and State of New York, respectfully shows to the court:

First.—That Hugh E. Morrison was born February 13, 1892.

That on the 6th day of October, 1917, Hugh E. Morrison entered the active military service of the United States as a soldier and that such active military service continued to the death of said Hugh E. Morrison.

That on the 20th day of October, 1918, Hugh E. Morrison, Private, Co. A, 2nd Machine Gun Battalion, died at Duexnouds de Beauzes, Department of Meuse, France, from wounds received while acting in the line of duty as a soldier in the military service of the United States of America.

That on or about the 1st day of February, 1918, Hugh E. Morrison applied for and was granted war risk insurance in the amount of \$10,000 by the Bureau of War Risk Insurance of the United States of America.

That said war risk insurance was in effect and force at the time of death of said Hugh E. Morrison.

That by the terms of said insurance and the acts and amendments thereto authorizing and regulating said insurance Hugh E. Morrison was permitted to name a beneficiary thereto by his last will and testament.

That on the 30th day of June, 1918, at Camp Devens, Mass., said Hugh E. Morrison wrote a certain letter to said James Morrison which contained the following: "I'm also carrying a \$10,000 insurance now. Have been ever since December. So really I'm worth more dead than alive anyhow. But I prefer

living a while yet. It's made out to you. So if anything happens to me you will be the first one notified. In fact you will be the only one."

The said letter is signed at the end thereof by said Hugh E. Morrison.

That on the 4th day of July, 1918, at Camp Devens, Mass., Said Hugh E. Morrison wrote another certain letter to said James Morrison, which contained the following typed form, blank spaces filled in in the handwriting of said Hugh E. Morrison:

* "Camp Devens, Mass.,, 1918.

"I have submitted an application for the following benefits in your favor:

Bureau of War Risk allotment..... \$ None

Plus Government allowance

Total per month

War Risk Insurance \$10,000

Quartermaster allotments \$. per month

"If any question arises as to the payment of these allotments or in regard to insurance, it will save a great deal of time if you communicate direct with Washington, rather than through me. If any question arises as to the War Risk allotments and allowances or war risk insurance, a letter should be addressed to the Bureau of War Risk Insurance, Treasury Department, Washington, D. C. In case there is any question you do not understand in regard to these matters or any assistance you need in obtaining information the Home Service Section of the Red Cross will show you the proper procedure to be followed.

"In taking up any of these matters the following information must be given in your letter:

"Full name of soldier, Private Hugh E. Morrison.

"Rank and organization, M, Gun Company, 303 Inf.

"Army Serial number, 1,659,868.

"Names and addresses of allottees, none.

"Amount of allotment and allowances, none.

"Amount of insurance, \$10,000.

"Name of first beneficiary, James Morrison.

"Address of first beneficiary, Cambridge, N. Y., R. F. D. No. 1.

"By communicating with Washington either directly or through the Home Service Section of the Red Cross rather than through me in regard to any of these benefits you will save a great deal of time and I feel that better and quicker results will be obtained. Do not destroy this letter and any letter that I send later regarding any change of allotment or insurance should be kept with this letter."

That your petitioner offers for probate, the said portions of the said two letters from the deceased Hugh E. Morrison, a soldier, as his last will of personal property.

Second.—That the said decedent was at or immediately previous to his entrance into the military service of the United States, a resident of the town of Jackson, Washington County, New York.

Third.—That the said portions of the two letters, relate to personal property

only, and that the value of said personal property therein referred to does not exceed the sum of \$10,000.

Fourth.—That as your petitioner is informed and believes, the following are the names, residences and degree of relationship of the heirs-at-law and next of kin of the said decedent, viz:

Names.	Residences.	Relationship.
James Morrison, your petitioner	Shushan, N. Y.	Uncle.
Hugh Morrison	No. Hoosick, Rensselaer Co., New York.	Uncle.
William E. Morrison	Cambridge, N. Y.	Uncle.
John Morrison	East Greenwich, N. Y.	Uncle.

John McEgan, father of said deceased Hugh E. Morrison, if alive, whose last-known place of residence was Killamallough, Londonderry, Ireland, and whose present residence is unknown after due diligence used, by writing letters of inquiry to those who should know, cannot be ascertained, and if he be dead, his widow, heirs-at-law and next of kin whose names and places of residence are unknown and after due diligence used cannot be ascertained, and generally all of the heirs-at-law and next of kin of the said deceased Hugh E. Morrison and their respective widows, whose names and places of residence are unknown and after due diligence used cannot be ascertained.

Fifth.—That the said decedent left no heirs-at-law or next of kin, except as herein stated, to the knowledge or belief of your petitioner.

Sixth.—That all of the foregoing named persons are of full age, except the following who are infants aged respectfully:

Names.	Ages.
.....
.....
.....

Seventh.—That no petition for the probate of said portions of said two letters as a nuncupative last will of said Hugh E. Morrison has been heretofore filed in any Surrogate's Court of this State as your petitioner is informed and believes.

That said deceased Hugh E. Morrison left no other last will and testament as your petitioner is informed and believes.

Eighth.—That no executor is named in said will.

That your petitioner James Morrison is the sole beneficiary named in said will.

That said deceased Hugh E. Morrison owed no debts as your petitioner is informed and believes.

Ninth.—That since the last-known place of residence of John McEgan the father of Hugh E. Morrison, was Killamallough, Londonderry, Ireland, and the name and residence of his widow, heirs-at-law and next of kin, if any there be, is unknown, and the names and residences of all of the heirs-at-law and next of kin generally of said deceased Hugh E. Morrison, and their respective widows not hereinbefore specifically set out, are unknown, leave to serve citations herein on the non-residents by publication is asked.

Wherefore, your petitioner prays that the said portions of said two letters from the deceased Hugh E. Morrison, a soldier, to James Morrison, may be proved as the nuncupative will of said Hugh E. Morrison, deceased, and that letters of administration with the will annexed of the goods, chattels and credits of said decedent be granted thereon according to law to your petitioner James Morrison; that the above-named persons may be cited to attend the probate thereof, and that upon the presentation of this petition the Surrogate of the County of Washington, may make such further and other order in relation to the probate of the said will, or the service of the said citation or the granting of administration with the will annexed, as may be just and proper.

Dated, Cambridge, New York, July 26, 1921.

JAMES MORRISON.

STATE OF NEW YORK, }
Washington County, } ss.:

James Morrison, being duly sworn, says that he is the petitioner above-named; that he has read the foregoing petition, by him subscribed, and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

JAMES MORRISON.

Sworn to before, this twenty-sixth }
day of July, 1921. }

DAVID G. ASHTON,

Notary Public.

SURROGATE'S COURT, Washington County.

In the matter of the estate of Hugh E. Morrison, late of the town of Jackson, Washington County, New York,

Deceased.

STATE OF NEW YORK, }
Washington County, } ss.:

James Morrison, being duly sworn says:

First.—That he has petitioned for administration with the will annexed of the estate of Hugh E. Morrison late of the town of Jackson, Washington County, New York, deceased; that his post-office address is Shushan, Washington County, New York; and that the said decedent died on the 20th day of October, 1918.

Second.—That deponent is acquainted with the character and value of the property of the said decedent, and that the same consisted of personal property only.

Third.—That the estimated value of the real property of which the said decedent died seized within the State was no dollars.

Fourth.—That the estimated value of the personal property namely, the war risk insurance, of which the said decedent died possessed was ten thousand dollars (\$10,000).

Fifth.—That the following are the names, residences and degree of relationship to the said decedent of all persons and corporations who are entitled to any devise, interest in real estate, legacy or distributive share under the said nuncupative will, or by reason of the partial intestacy of the said decedent, viz.:

Names.	Residences.	Relationship.
James Morrison.....	Shushan, N. Y.	Uncle.

Sixth.—That the following is the estimated value of the legacy, or distributive share, and of the devise, or interest in real estate, to each of the said named persons, viz.:

Names.	Legacy or Distributive Share.	Devise or Interest in Real Estate.
James Morrison....	\$10,000	..... JAMES MORRISON.

Sworn to before, this twenty-sixth }
day of July, 1921. }
DAVID G. ASHTON,
Notary Public.

STATE OF NEW YORK, }
Washington County, } ss.:

I, James Morrison do solemnly swear that I will well, honestly and faithfully, discharge the duties of administrator with the will annexed of the estate of Hugh E. Morrison, late of the Town of Jackson, Washington County, New York, according to law.

JAMES MORRISON.

Subscribed and sworn to before me, this }
twenty-sixth day of July, 1921. }
DAVID G. ASHTON,
Notary Public.

David G. Ashton, attorney for petitioner, Cambridge, Wash. Co., N. Y.

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